TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1917

No. [redacted] 454

PHILADELPHIA & READING COAL & IRON COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN GILBERT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

[redacted]

[redacted]

(25,857)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1027.

PHILADELPHIA & READING COAL & IRON COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN GILBERT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Supreme Court, Appellate Division, Second Department.

JOHN GILBERT, Plaintiff-Respondent,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant-Appellant.

Case on Appeal.

Macklin, Brown & Purdy, Attorneys for Defendant-Appellant, 17 Battery Place, New York City.
Stephen A. Machcinski, Attorney for Plaintiff-Respondent, 31 Nassau Street, New York City.

1 Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL & IRON COMPANY, Defendant.

Statement under Rule 41.

This is an action for personal injuries and was commenced by the service of the summons and complaint on the 26th day of July, 1915. On the 13th day of August, 1915, the defendant made a motion to set aside the service of the summons and complaint upon the ground that the said service was in violation of the Constitution and laws of the United States. Said motion was denied. Under compulsion, defendant served its answer on the 13th day of November, 1915, and the cause was brought on for trial before Mr. Justice Arthur S. Tompkins and the jury at a Trial Term, Part I, held in and for the County of Westchester, and said trial resulted in a verdict in favor of the plaintiff in the sum of Ten thousand dollars ($10,000). Judgment was entered thereon on the 18th day of March, 1916,
2 in the sum of Ten thousand, one hundred and two and 56/100 dollars ($10,102.56), and an order was entered in the office of the Clerk of the County of Westchester, denying defendant's motion to dismiss the complaint and to set aside the verdict. An appeal was taken from said order and judgment, defendant having served its notice of appeal on the 23rd day of March, 1916.

There were no changes of parties or attorneys.

Notice of Appeal.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

SIR: Please take notice, that the Philadelphia & Reading Coal and Iron Company, the defendant above named hereby appeals to the Appellate Division of the Supreme Court, Second Judicial Department, from the judgment entered in favor of the plaintiff and against the defendant for the sum of Ten thousand one hundred and two and 56/100 ($10,102.56) Dollars, in the office of the Clerk
3 of the County of Westchester, on the 18th day of March, 1916; and also from the order denying defendant's motions to dismiss the complaint, and defendant's motion to set aside the verdict and for a new trial, and from each and every part of said judgment and order.

Dated, New York, March 23, 1916.

Yours, &c.,

ARMSTRONG, BROWN & PURDY,
Attorneys for Defendant.

Office and Post Office Address, 27 Cedar Street, Borough of Manhattan, City of New York.

To Stephen A. Machcinski, Esq., Attorney for Plaintiff, 31 Nassau Street, New York City, Clerk of Westchester County, White Plains, New York.

4 *Summons.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL & IRON COMPANY, Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service and in case of your failure to appear or answer, judgment will

be taken against you by default for the relief demanded in the complaint.

Dated, New York, July 16th, 1915.

Yours, &c.,

STEPHEN A. MACHCINSKI,
Attorney for Plaintiff.

Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, New York City.

5 *Complaint.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL & IRON COMPANY, Defendant.

The plaintiff above named complaining of the defendant, by Stephen A. Machcinski, his attorney, respectfully shows to this Court and alleges:

First. Upon information and belief, that on the 15th day of October, 1914, at the time of the happening of the occurrence hereinafter set forth, the laws of the State of Pennsylvania, then and there in force and effect provided as follows:

"Anthracite Mining Laws of Pennsylvania."

An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith.

"Article 1."

Section 1. Be it enacted, &c., That this act shall apply to
6 every anthracite coal mine or colliery in the Commonwealth, provided the said mine or colliery employs more than ten (10) persons.

"Article 12, General Rules."

The following general rules shall be observed in every mine to which this act applies:

Rule 31. A charge of powder or any other explosive in slate or rock which has missed fire shall not be withdrawn or the hole reopened.

Rule 34. Before commencing work and also after the firing of every blast, the miner working a breast or any other place in the mine, shall enter such breast or place to examine and ascertain its

condition, and his laborer or assistant shall not go to the face of such breast or place until the miner has examined the same and found it to be safe.

Rule 36. A person who is not a practical miner shall not charge or fire a blast in the absence of an experienced miner, unless he has given satisfactory evidence of the ability to do so with safety, and has obtained permission from the mine foreman or person in charge.

Rule 58. Every person who fails to comply with any of the foregoing rules or any of the provisions of this article, shall be guilty of an offense against this act.

7 An Act relating to anthracite mines and providing for the care and life and attention of employees injured in and about said mines.

Section 6. That for any injury to employees, occasioned by any violation of the act, or any failure to comply with its provisions, by any owners, operators or superintendents, of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator, for any direct injuries he may have sustained thereby; and in case of loss of life, limb or bodily power, by reason of such neglect or failure aforesaid, a right of action shall accrue to the person, widow or lineal heirs, for the recovery of damages for the injury he or they shall have sustained.

Section 7. The term "coal mine," as herein used, includes the shafts, slopes, drifts or inclined places, connected with the excavations penetrating coal stratum or strata, which excavations are ventilated by one general air current, or division thereof, and connected by one general system of mine railroads, over which coal may be delivered to one or more parts outside the mine. The term "mine foreman" means the person who shall have, on behalf of the operators, immediate supervision of a coal mine. The term "operator" means any firm, corporation or individual operating any coal mine. The term "anthracite mine," shall include any coal mine not now included in the bituminous boundaries.

8 The Employers' Liability Act of Pennsylvania is as follows:

Extending and defining the liability of employers, in actions for negligence, for injury or death of their employes; declaring what shall be a defense in such actions by employees against their employers, and defining who are agents of the employer, under this act.

Section 1. Be it enacted, &c., That in all actions brought to recover from an employer for injury suffered by his employee, the negligence of a fellow servant of the employee shall not be a defense, where the injury was caused or contributed to by any of the following causes; namely:

Any defects in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant or

machinery; the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the negligence of any person to whose orders the employee was bound to conform, and did conform, and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

9 Section 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.

Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

Approved—the 10th day of June, A. D. 1907.

Pamphlet Laws, 523.

EDWIN S. STUART.

Second. Upon information and belief, that at all the times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having a place of business in the City, County and State of New York.

Third. That plaintiff is a resident of the State of New York.

Fourth. That at all the times hereinafter mentioned the defendant controlled and operated certain mines and collieries including the mine or colliery hereinafter mentioned, at Shenandoah, Pennsylvania.

Fifth. That on or about the 15th day of October, 1914, and for some time prior thereto the defendant operated and had control of a certain anthracite colliery or mine known as Lanigan Colliery

10 at Shenandoah, Pennsylvania, and that the plaintiff was then and there employed by said defendant as a laborer in said mine or colliery.

Sixth. That in the course of plaintiff's employment by the defendant it was the duty of the plaintiff to help and assist in the mining of coal.

Seventh. That on the 15th day of October, 1914, the said Lanigan Colliery was an anthracite mine or colliery and employed more than ten (10) persons.

Eighth. That on said 15th day of October, 1914, at about 12 o'clock noon, plaintiff was ordered and directed by the miner to drill holes as in rock and to load or charge said holes with dynamite.

Ninth. That on said 15th day of October, 1914, at about 12 o'clock noon, plaintiff was further ordered and directed by said miner to place fuses and exploders in said holes and to light said fuses for the purpose of exploding same.

Tenth. That on said 15th day of October, 1914, at about 12 o'clock noon, plaintiff after lighting said fuses and causing one of said charges to explode, was ordered and directed by the said miner to examine the other unexploded charge, and in so doing, said charge,

without any carelessness or negligence on the part of the plaintiff, exploded causing plaintiff to receive severe and permanent injuries to his head, arms, and body and causing him to sustain total loss of sight.

Eleventh. That said accident occurred through no fault or carelessness on the part of the plaintiff, but wholly and solely through the carelessness and negligence on the part of the defendant,
11 its superintendent, foreman or miner in that said defendant, its superintendent, foreman or miner failed to exercise due and proper care to provide plaintiff with a safe and proper place in which to work and that the defendant failed to make and enforce proper rules and regulations in reference to the conduct of its business; and that the defendant failed to supply a proper, careful and efficient superintendent, foreman or miner and fellow servants to assist and direct plaintiff in the performance of his duty, and in that, said miner was careless and negligent in directing and ordering plaintiff to charge and fire a blast, and in directing and ordering said plaintiff to examine and ascertain its condition after said blast was fired.

Twelfth. That by reason of the negligence and carelessness on the part of the defendant as aforesaid plaintiff has been totally and permanently incapacitated from performing any labor whatsoever, and has suffered and still suffers great pain and has been compelled to expend sums of money for medicine and medical attendance, solely by reason of the defendant's negligence, all to his damage in the sum of One hundred thousand ($100,000) Dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of One hundred thousand ($100,000) Dollars, besides the costs and disbursements of this action.

STEPHEN A. MACHCINSKI,
Attorney for Plaintiff.

Office & Post Office Address, 31 Nassau Street, Borough of Manhattan, New York City.

12 STATE OF NEW YORK,
City of Yonkers,
County of Westchester, ss:

John Gilbert, being duly sworn, deposes and says: That he is the plaintiff in the within entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

his
JOHN X GILBERT.
mark

Sworn to before me this 8th day of July, 1915.

MARIE D. SCHMALZ,
Comm. of Deeds, New York City.

Residing in Borough of B'klyn, County Register's Nos. N. Y. 15096, Kings 5072, County Clerk N. Y. 7.

13 *Answer.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

The defendant reserving to itself the objection to the jurisdiction of this Court over the person of the defendant in this cause and over the cause of action, and answering under protest the complaint herein by Armstrong, Brown & Purdy, its attorneys, alleges:

1st. Defendant admits that it is a citizen and inhabitant of the State of Pennsylvania, a foreign corporation organized and existing under and by virtue of the laws of that State. That at the time of the alleged accident referred to in the complaint, it owned the mine or colliery referred to in said complaint which mine or colliery employed more than ten (10) persons.

2nd. Defendant denies that the statutes of the State of Pennsylvania are correctly set forth in the first paragraph of the complaint herein, and begs leave to refer to the originals for proof thereof upon the trial of this action.

14 3rd. Defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs marked "Eighth" and "Ninth" of the complaint herein, and therefore denies each and every allegation contained in said paragraphs marked "Eighth" and "Ninth" of the complaint.

4th. Defendant admits the plaintiff was injured on or about the 15th day of October, 1914, but denies that it has any knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph marked "Tenth" of the complaint, and therefore denies the same.

5th. Defendant admits that it has an office in the City, County and State of New York, but denies that this Court has jurisdiction over, either the person of this defendant or the cause of action set forth in the complaint herein.

6th. Upon information and belief, defendant denies each and every allegation contained in paragraph marked "Third" of the complaint herein.

7th. Defendant denies each and every other allegation in said complaint contained.

For a further separate and distinct defense, defendant alleges:

8th. That the Laws of the State of Pennsylvania by the Act of June 2, 1891, Pennsylvania Laws, etc., entitled "An Act to Provide for the Health and Safety of the persons employed in and about the Anthracite Coal Mines of Pennsylvania and for the protection
15 and Preservation of the Property connected therewith," takes the management of mining operations in Anthracite Coal

Mines in the State of Pennsylvania out of the control of the owner and places it in the charge and control of the certified mine foreman, with whom the owner or its superintendent may not interfere, which said law was in full force and effect at the time of the accident referred to in the complaint herein.

9th. That the defendant's said mine was at the time of the accident referred to in the complaint, in charge of a duly certified mine foreman as provided for in said act, and that said mine was an Anthracite Coal Mine.

10th. That the Courts of the State of Pennsylvania have decided and hold that a person injured by the negligence of a mine foreman, has no right of action against the owner of the mine, for the reason that said State made the mine foreman its representative and vested in him the determination of all questions relating to the safety of miners, with power to compel compliance with his directions.

11th. That the Supreme Court, the highest Appellate Court of Pennnsylvania, has decided that the Act of June 10, 1907, known as the Employers' Liability Act of Pennsylvania, does not change the law relating to Anthracite Mines and that so far as said act purports to make the owner or operator of a coal mine liable for the negligence of a certified mine foreman, the same is unconstitutional and void.

12th. That said mine was in fact operated by said mine foreman as a representative of the State of Pennsylvania.

16 13th. Upon information and belief, the injuries sustained by the plaintiff, if received by or through any one's negligence other than his own, were received by or through the negligence of said mine foreman or some other person, for whose negligence this defendant is not responsible.

For a further separate and distinct defense, defendant alleges:

14th. That the accident referred to in the complaint was not caused or contributed to by any negligence on the part of the defendant, its agents or servants or by any person over whom it had control, but was caused solely or partially through the negligence of the plaintiff or by some person over whom this defendant had no control or direction.

And for a further separate and distinct defense, defendant alleges:

15th. Upon information and belief, that neither at the time the cause of action set forth in the complaint arose nor at the time of the commencement of this action nor at any time since, was the plaintiff a bona fide resident, citizen or inhabitant of the State of New York; that said plaintiff was an alien and not a citizen of the United States; that the defendant is a foreign corporation, organized and existing under and by virtue of the Laws of the State of Pennsylvania; that the cause of action did not arise within this State but arose within the State of Pennsylvania, and did not arise out of any right to real property within this State nor out of any contract made in this State nor out of any business transacted by the defend-

17 ant in this State and this Court has not, and should not entertain jurisdiction of this cause.

And for a further separate and distinct defense, defendant alleges:

16th. On information and belief, this Court has no jurisdiction of the person of this defendant or of the subject matter of this action, in that the plaintiff is not now and never has been a bona fide resident, citizen or inhabitant of the State of New York. The defendant at all the times stated in the complaint was and now is a foreign corporation. The cause of action arose in the State of Pennsylvania and did not arise with respect to any business done by the defendant in the State of New York, but is a claim for personal injuries alleged to have been sustained by the plaintiff in the State of Pennsylvania, at a time when both the plaintiff and defendant were residents of said State of Pennsylvania.

17th. The defendant does no business in the State of New York, except that it maintains an office at No. 143 Liberty Street, in the Borough of Manhattan, City of New York, for the solicitation and receipt of orders for the sale of coal, which are forwarded to the defendant's main office in Philadelphia for approval, and said orders, if accepted, are filled from the State of Pennsylvania and the coal shipped to New York; defendant also maintains depots and yards for the sale of coal in Buffalo, Rochester and Lyons, but conducts none of its mining operations in the State of New York.

18th. Pursuant to the requirement of Section 16 of the
18 General Corporation Law, the defendant has a duly designated agent upon whom process can be served, to wit: James Armstrong, No. 27 Cedar Street, Borough of Manhattan, City and State of New York; that said designation is now in full force; said designation was required to be filled by the Statutes of the State of New York, as a condition for the defendant doing any business whatever in this State.

19th. The summons and complaint herein were served upon said designated agent on the 26th day of July, 1915.

20th. That said service was void, and an attempt to subject the defendant and its property to the jurisdiction of this Court under such service, is in violation of Section 1 of the 14th Amendment of the Constitution of the United States, and it is an act depriving or attempting to deprive the defendant of its property without due process of law.

21st. Defendant, before appearing or answering, made its motion to set aside the service of the summons and complaint, and the same was denied.

22nd. This answer is interposed preserving to the defendant, its rights, without waiving any rights the defendant may have with respect to the invalidity of said service, or to challenge the jurisdiction of this Court over the person of the defendant or of the subject matter of this action.

Wherefore, defendant demands judgment dismissing the complaint herein with costs.

ARMSTRONG, BROWN & PURDY,
Attorneys for Defendant.

Office and P. O. Address, 27 Cedar Street, Borough of Manhattan, New York City.

2—1027

19 STATE OF NEW YORK,
County of New York, ss:

Pierre M. Brown, being duly sworn, deposes and says, that he is one of the attorneys for the defendant herein, that he has read the foregoing answer to the complaint herein, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by the defendant is that defendant is a foreign corporation and deponent is one of its attorneys.

That the source of deponent's information and the grounds of his belief are reports and statements made to him by the officers and employees of said defendant.

PIERRE M. BROWN.

Sworn to before me this 3rd day of November, 1915.
T. D. ENGLISH,
Notary Public Kings Co. #8.

Cert. filed in N. Y. Co. #9.

20 *Plaintiff's Bill of Particulars.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL & IRON COMPANY, Defendant.

SIRS: Plaintiff for his bill of particulars alleges as follows:

First. That on the 15th day of October, 1914, plaintiff resided at No. 320 Turkey Run, Shenandoah, Pennsylvania.

Second. That on July 26th, 1915, plaintiff resided at No. 9 St. Marys Street, Yonkers, New York.

Third. The present address of the plaintiff is No. 442 Walnut Street, Yonkers, New York.

Fourth. Plaintiff claims that the defendant violated each and every rule of the Mining Laws set forth in plaintiff's complaint. Defendant's superintendent was negligent and violated the rules of the Employers' Liability Act of Pennsylvania, set forth in the complaint.

21 At the time of the accident plaintiff was carelessly and negligently directed by his superior to place fuses and explosives in holes; that he was improperly and insufficiently directed and instructed in the performance of said work; that he was not warned of the dangers to be expected when placed in close proximity thereto and he was insufficiently guarded against the dangers of the place where he was placed at work. That the defendant's superin-

tendent, foreman or person having authority to order and direct plaintiff to go in close proximity thereto was further careless and negligent in directing and ordering plaintiff to examine an unexploded charge, and the defendant was further careless and negligent in that the miner failed and neglected to examine the unexploded charge before directing the plaintiff to work thereon.

Fifth. Plaintiff claims the complete loss of his left eye and claims almost total loss of his right eye, and plaintiff claims that quantities of pieces of coal and rock are imbed-ed in his face, eyes, head and arms, and plaintiff claims that said injuries are permanent.

Sixth. Plaintiff claims expenses in the sum of Sixty-five ($65.00) dollars for carfare to Wills Hospital and return.

Seventh. Plaintiff paid no moneys for medical attention.

Eighth. Plaintiff had no expense for medicine.

Ninth. That since the accident, plaintiff has been unable to work and he is informed and believes that he will not be able to
22 perform any work whatsoever in the future.

Tenth. That has been answered in the preceding paragraphs.

Eleventh. A little over Two ($2.00) dollars per day.

Twelfth. No wages whatsoever.

Thirteenth. The name of the person who directed plaintiff to drill holes in rock, is Tony McCormick.

Fourteenth. Tony McCormick.

Fifteenth. Tony McCormick.

Sixteenth. The specification of the acts of negligence are that the defendant failed and neglected to provide *siu*table and proper explosives and fuses and in addition thereto neglected and failed to have a well known and customary method of exploding fuses and examine same before directing plaintiff to go in close proximity thereto.

Seventeenth. That has been answered in the preceding paragraphs.

Eighteenth. The rules and regulations specified in the complaint are the Mining Laws of Pennsylvania.

Nineteenth. The names and addresses of the physicians are unknown by the plaintiff.

23 Twentieth. Plaintiff was treated in the Ashland Hospital and later in Wills Hospital.

Twenty-first. That has been answered in the preceding paragraphs.

Twenty-second. The preceding items are answered to the best of plaintiff's knowledge and ability.

STEPHEN A. MACHCINSKI,
Attorney for Plaintiff.

Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, New York City.

To Armstrong, Brown & Purdy, Attorneys for Defendant, Office and P. O. Address, 27 Cedar Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
City of Yonkers,
County of Westchester, ss:

John Gilbert, being duly sworn, deposes and says that he is the plaintiff in the within entitled action; that he has read the foregoing bill of particulars and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein
24 stated to be alleged on information and belief and as to those matters he believes to be true.

JOHN X GILBERT.

Sworn to before me this 28th day of December, 1915.
ALFONS BLASEWITZ,
Com. of Deeds, Yonkers, N. Y.

Extract from Clerk's Minutes.

At a Trial Term of the Supreme Court, Part I. Held in and for the County of Westchester, at the Court House, in the Town of White Plains, on the 8th Day of February, 1916.

Present: Hon. Arthur S. Tompkins, Justice.

JOHN GILBERT

vs.

PHILA. & READING COAL & IRON CO.

The jury retired in charge of an officer sworn for that purpose, and return and say they find a verdict for the plaintiff for Ten thousand ($10,000) Dollars. Motion made by counsel for defendant to set aside the verdict and dismiss the complaint, and for a new
25 trial upon the minutes and upon all the grounds specified in Section 999 of the Code of Civil Procedure.

Motion denied.

A true extract from the minutes.

DANIEL J. CASHIN, *Clerk.*

Judgment.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

The issues in the above action having duly come on for trial before Honorable Arthur S. Tompkins, Justice and a jury, at Trial

Term, Part I, of this Court, and the jury having returned a verdict in favor of the plaintiff and against the defendant for the sum of Ten thousand ($10,000.00) Dollars, and the costs of the plaintiff having been taxed at $102.56.

Now, on motion of Stephen A. Macheinski, attorney for the plaintiff, it is

26 Ordered and adjudged, that the plaintiff, John Gilbert do recover of the defendant Philadelphia & Reading Coal and Iron Company, the sum of Ten thousand ($10,000.00) Dollars damages together with $102.56, costs as taxed, making in all the sum of Ten thousand one hundred two ($10,102.56) Dollars and fifty-six cents, and that said plaintiff have execution therefor.

Dated, White Plains, March 18th, 1916.

DANIEL J. CASHIN, *Clerk.*

Order Denying Motion to Dismiss and Denying Motion for a New Trial.

At a Trial Term of the Supreme Court, Held in and for the County of Westchester, at the Westchester County Court House, in White Plains, N. Y., on the — Day of March, 1916.

Present: Hon. Arthur S. Tompkins, Justice.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

The defendant having moved at the close of the plaintiff's

27 case and at the close of the entire case to dismiss the complaint herein, decision upon which motions was reserved until after the verdict, and a verdict having been returned in favor of the plaintiff and against the defendant in the sum of Ten thousand Dollars ($10,000.00), and the defendant, without waiving its previous motions, having moved the Court to set aside the verdict and to dismiss the complaint on the ground that said verdict was contrary to the evidence, contrary to law, and upon the exceptions taken at the trial, it is

Ordered:

1st. That defendant's motions made during the trial and upon which decision was reserved be denied, and exception by the defendant is hereby noted.

2nd. That the motion to set aside the verdict and to dismiss the complaint be denied.

Enter,

A. S. T., *J. S. C.*

28 New York Supreme Court, Westchester County.

Before Tompkins, J., and a Jury.

JOHN GILBERT

against

PHILADELPHIA & READING COAL & IRON COMPANY.

WHITE PLAINS, February 7, 1916.

Appearances.

Mr. Stephen A. Macheinski, Attorney for the Plaintiff.
Mr. Manton, of counsel.
Mr. P. M. Brown, Attorney for the Defendant.

A jury empaneled and sworn.

Mr. Manton, on behalf of the plaintiff, and Mr. Brown, on behalf of the defendant, opened the case to the jury.

Mr. Manton: Under a stipulation I have here, I offer in evidence the articles of the Mining Laws of Pennsylvania which are included in paragraph first of the complaint and Employer's Liability Law included in paragraph first of the complaint.

Received in evidence.

29 JOHN GILBERT, the plaintiff, called as a witness in his own behalf, through an interpreter, being duly sworn, testified as follows:

Direct examination by Mr. Manton:

Q. How old are you?
A. Twenty-nine years old.
Q. How long are you in this country?
A. Going on the second year.
Q. Do you know how many months you have been here?
A. 1914, 14th of May, I came to this country.
Q. Where did you come from?
A. From England.
Q. When you came here did you stay in New York any length of time?
A. One day.
Q. Then did you go to work in Pennsylvania?
A. Yes.
Q. Did you go to work for the Philadelphia & Reading Coal & Iron Company at Shenandoah?
A. Yes, sir.
Q. When did you start to work for this Company?
A. That same year, on the 21st day of May.

Q. Where did you go to work, in what mine or colliery?
A. Lanagan Mine.

Mr. Brown: They call it Lanigan for short, that is the same one.

Q. When did you go to work in the mine?
A. 1914, the month of May.
Q. Who employed you at first?
A. The mine boss.
30 Q. What is his name?
A. William Johnson.
Q. Jones or Johnson?
A. Johnson I think.

Mr. Brown: It is Jones.

Q. When Jones employed you what did he say to you?
A. He brought me over to the miner and told me whatever the miner should tell me I should do, whatever he told me to do.
Q. Was anything said about your pay?
A. He did not tell me how much money I was going to receive, but you will see when you get checks how much money you will receive.
Q. What work did you first do when you went in the mines?
A. I used to load coal on cars.
Q. How long did you continue that work loading coal on cars?
A. Two or three months.
Q. Who was the miner you were working with then, who were the men you were working with during that two or three months?
A. I recall the first name was Mike, the last name I don't know, Jacobolski or something, I don't know exactly.
Q. Was Mike a miner?
A. Yes.
Q. How long did you work under Mike, the miner?
A. Only about a month.
Q. Then who did you go to work with?
A. I went to work for a man named Tom McGuire.
Q. What kind of work did you do with Tom McGuire?
A. When I went to work for Mr. McGuire the boss told me to mind the miner, also he told me to drill holes, or whatever he told me to do.
Q. What boss told you to do that?
A. William Johnson.
31 Q. Jones I think it is?
A. William Johns.
Q. William Jones or Johns?

Mr. Brown: Jones is his name.
Mr. Manton: Then we will call him Jones.

Q. Was McGuire a certified miner?
A. Yes.
Q. How long did you work for him under McGuire then?
A. I was working for Mr. McGuire eight days, and the ninth day I got injured.
Q. Was that Mr. McGuire or Mr. McCormack?

A. Tommy McCormack.

Q. How were you paid when you were working up to this time, how much a day?

A. I used to get daily $2.30.

By the Court:

Q. Was McCormack a certified miner under whom you worked eight or nine days before the accident?

A. I don't know, your Honor, if he was a certified miner or was just a piece worker, but the boss told me to mind Mr. McCormack.

Q. Was he the man who was your boss the eight or nine days before you were hurt?

A. Yes, your Honor.

Q. Was he a miner?

A. McCormack did not do any work at all, he was just sitting around to give us orders what to do.

By Mr. Manton:

Q. Did he give you instructions what to do?

A. Yes.

32 Q. How many men worked under McCormack with you?

A. Myself and another laborer.

Q. What was the other laborer's name?

A. John Usdavenas.

Q. What were you doing eight or nine days before you were hurt?

A. Mr. McCormack told me to drill holes and put a mine there, whatever he told me, he told me to load coal, or whatever he told me to do I done it.

Q. Did you drill some holes during the eight days before the accident?

A. Yes.

Q. Was dynamite used in the holes?

A. Yes.

Q. How deep were the holes that you drilled?

A. There was all kinds of sizes, four feet, five feet, six feet, and all kind of sizes.

Q. Did you set some of that dynamite off by lighting a fuse?

A. Yes, whenever the miner told me to do it I done it.

Q. Whenever Mr. McCormack told you to do it?

A. Yes.

Q. On the day that you were hurt were there some holes drilled just before the noon hour?

A. Yes.

Q. Where were they drilled?

A. Down in the bottom.

Q. Was this in the Elengowan colliery?

A. Yes.

Q. Who drilled the holes just before noon?

A. Myself and the other laborer.

Q. Was there some dynamite put in the holes?

A. Yes.
Q. What kind of dynamite, stick dynamite or powder dynamite?
A. It was six or eight inches long.
33 Q. How many of those holes were loaded with dynamite before the noon hour?
A. Two.
Q. Who loaded those two?
A. I done one and the other laborer done the other one.
Q. After the holes were loaded did McCormack tell you anything to do to them?
A. He told me to light the fuse.
Q. Did he tell the other laborer to do anything?
A. Yes.
Q. What?
A. He told me to fire one and he told the other man to fire the other one.
Q. Did you fire one?
A. The one I fired went off and the other man's did not go off.
Q. How long was that before your lunch time or dinner time?
A. It was just at the noon hour, twelve o'clock.
Q. How far apart were these two holes, the one you set off and the one the other laborer set off?
A. Five or six paces away.
Q. After you set your blast off what did you do next?
A. I didn't do anything, I was waiting for the others to come.
Q. Did you go to your lunch then?
A. Yes.
Q. How long did you take eating your lunch?
A. About twenty minutes.
Q. After your lunch did you see McCormack and did he say anything to you?
A. Mr. McCormack told me I should go and see this other hole why it didn't go off.
Q. Was McCormack around you when you were eating your lunch, during the twenty minutes?
A. Yes.
Q. Did he go back to the hole that didn't go off at any time during that twenty minutes?
A. No.
34 Q. And then did you go back to the hole that did not explode?
A. Yes, that time when I went there it go off, that is the time I got injured.
Q. How far back did you have to go to the hole that did not explode?
A. I was about two paces away when that come off.
Q. When you came from dinner how far did you have to go back to the hole?
A. About fifty paces.
Q. You say you went back and when you got two feet from the hole what happened?

A. When I was about two paces away that is the time the shot come off.

By the Court:

Q. Two paces away from what, from the charge?
A. From the charge.

By Mr. Manton:

Q. Is that the charge that did not go off that the other man loaded?
A. Yes.
Q. Then what happened to you?
A. My mouth, my hands, my chest, my eyes——

By the Court:

Q. What happened to you, were you blown up?
A. When the discharge come off I dropped down, and that is all I know.

By Mr. Manton:

Q. Did this explosion go into your eyes and mouth and face and nose?
A. Yes.
35 Q. Did it knock you off your feet?
A. Yes.
Q. Then did somebody come and take you out?
A. Mr. McCormack come and picked me out.
Q. When this explosion went off was there some blaze, fire, smoke from it?
A. That is the usual way it comes out.
Q. It came out this time, and did some of it hit you?
A. Yes, wherever you see these black marks, that is coal.
Q. Did you go to the hospital?
A. Yes.
Q. What hospital did you go to?
A. The Miners' Hospital.
Q. That is, in Shenandoah?
A. Yes.
Q. How long did you remain in the hospital?
A. Eleven weeks.
Q. Did you lose your right eye?
A. Yes.
Q. The right eye was taken out?
A. They took it out in the hospital.
Q. The same day you were hurt?
A. Yes.
Q. Then could you see out of your left eye?
A. No.
Q. Can you see now the interpreter that is talking to you with your left eye?
A. No.

Q. Is there just a faint light in the left eye?
A. If it is nice clear day I can distinguish the light, but if it is a nice clear day only.
Q. Before this accident did you have good eyesight in both eyes?
A. Yes.
Q. Did you have any marks on your face before the accident?
A. No, sir.
Q. Were you hurt anywhere else except the eyes and your face?
A. My hand and my chest, and all around.
Q. Were they burned or marked, your hands and chest?
A. Yes.
36 Q. How long was it before the burns of your hands healed up?
A. It took about fourteen weeks, before my hands got a little healed up and my chest.
Q. When did you leave Pennsylvania?
A. 1915, in the month of April.
Q. Where did you go to live then?
A. I come to Yonkers.
Q. Who did you go to live with there?
A. Mrs. Mulikoli.
Q. Is she related to you in any way?
A. My sister.
Q. Have you been living there ever since?
A. Yes.
Q. Did you intend to return to Pennsylvania from the time you left it until the present time at any time?
A. I went back to Philadelphia and was about two weeks in the Philadelphia Hospital.
Q. That was for treatment to your eye?
A. Yes.
Q. Other than those two weeks that you went to Philadelphia for treatment have you remained in Yonkers all the time up to the present time?
A. Yes.
Q. And stayed with this relative in Yonkers?
A. Yes.
Q. Do you now or at any time have you intended to return to Pennsylvania to live and make it your home?
A. No, sir, I haven't got no one there.
Q. Have you a wife?
A. Yes.
Q. Where does she live?
A. In England.
Q. Have you a family?
A. No, sir.
Q. Does this relative maintain a home in Yonkers?
A. She lives with her father, she hasn't got no money, she lives with her father.
37 Q. Not your wife, I want to know about this sister in Yonkers?

A. Yes, in Yonkers.
Q. Is this your sister, or half sister?
A. My grandfather and her grand mother were brothers and sisters, but that is the way they do it on the other side, they call it sister.
Q. You are a cousin then, aren't you?
A. Yes.

By the Court:

Q. Does she keep house in Yonkers?
A. Yes, sir.

By Mr. Manton:

Q. Has she a family there?
A. Yes, two children.
Q. Have you worked at all since you have been hurt?
A. No, sir.
Q. What wages a day were you making before you were hurt?
A. $2.30 a day.
Q. When you got paid your time did you get a slip?
A. Yes, the mine boss used to give us a check and when that check was rendered to the office we used to get our money.

By the Court:

Q. To what office?
A. The company's office.

By Mr. Manton:

Q. In Shenandoah, Pennsylvania?
A. Yes.

Mr. Manton: I offer in evidence the slip for the month of October, the month he was hurt.
Marked Exhibit 1.
38 Mr. Brown: Here are all the slips.
Mr. Manton: I offer them in evidence.
Marked as one exhibit, Exhibit 2.

Cross-examination by Mr. Brown:

Q. Mr. Gilbert, as I understand it, you had two holes charged in the lower part of the gangway?
A. Yes.
Q. You charged one and you say Mr. Usdavenas charged the other?
A. Yes.
Q. You lit one and Usdavenas lit the other?
A. Yes.
Q. Then did you all three, you and Usdavenas and Mr. McCormack, go out of the place?
A. Yes.
Q. One of these shots went off while you were outside?
A. Yes.

Q. How long did you wait after that first shot went off?
A. About twenty minutes.
Q. And all three of you remained outside?
A. Yes.
Q. And those were the only three men that were working there?
A. Yes.
Q. You say that Mr. McCormack told you to go back to the place of the breast?
A. Yes.
Q. McCormack was a certified miner, wasn't he?
A. Yes.
Q. He stayed outside?
A. Yes.
Q. And the other man he stayed outside?
A. Yes.
Q. And this accident happened on pay day, didn't it?
A. Yes.
Q. You were going to get through at two o'clock and that would have ended your shift?
A. Supposed to work until three o'clock that day.
Q. What you wanted to do was to get this coal to be blown up and loaded on the car and take it outside before you quit?
A. Yes.
39 Q. The shot that hurt you, was that the one you lit or the one the other man lit?
A. The other man.
Q. Did you think it was lit or did you think it was not lit?
A. I know mine was lit, I don't know about the other one, what he done.
Q. When the miner told you to go back after waiting twenty minutes did you say anything to him about this shot might go off and hurt you?
A. I told Mr. McCormack, "I am rather afraid to go there," and Mr. McCormack replied to me, if it did not shoot off in such a period of time it must be all right."
Q. You went in all alone then did you?
A. I went in myself because Mr. McCormack sent me there.
Q. This hole was about twenty-five feet in from the surface, wasn't it?
A. Yes.
Q. Did you think that this shot might still go off?
A. I did not know that it would come off.
Q. You didn't know one way or the other, did you?
A. No, sir.
Q. Didn't Mr. Cormack tell you to keep out of that place and go home?
A. No.
Q. Didn't Mr. Usdavenas follow you up too and tell you to keep out of that place and not go in there?
A. They did not tell me anything.
Q. Neither one of them?

A. The only thing Mr. McCormack ordered me to go there.
Q. Why didn't they go in after you?
A. Mr. McCormack never done any work, he just come around and stood around or walked around there, he told me to go there.
Q. Mr. McCormack stood outside on the surface and amused himself?
A. Yes.
40 Q. He sat outside all the time and yet you two fellows do the work?
A. He used to sit around there where we used to work.
Q. Did Mr. Usdavenas do any work, or did he take it easy too?
A. He done the same work I did always, and when there was enough coal we use to put it on the car.
Q. This is the way you drove this gangway, by drilling and dynamite right straight along?
A. In those eight days whatever the miner told me to do I done whatever he told me.
Q. But in doing that work didn't you drill this gangway by charging the hose with dynamite right straight along?
A. Yes.
Q. You say that you have never been back to Pennsylvania except right after you came here you went back to the hospital in Philadelphia about a week?
A. Yes.
Q. And you came here in April, 1915?
A. Yes.
Q. How long did you stay here in New York until you took this visit back to Philadelphia or to Pennsylvania?
A. I was about a week—not in New York, I was in Yonkers about a week and then I went to Philadelphia.
Q. And you stayed in the hospital there about a week?
A. Two weeks.
Q. Then you came back to Yonkers?
A. I went back to Shenandoah to get my benefit there, from Philadelphia I went to Shenandoah.
Q. Then you got your benefit that was given to you as a miner?
A. Yes.
Q. From Shenandoah did you come straight back to Yonkers?
A. Yes.
Q. That was some time in the latter part of April or in May, 1915?
A. May.
Q. From that day to this you have never been back to Pennsylvania?
A. No.
41 Q. You are sure of that?
A. No.
Q. Weren't you in Shenandoah last Saturday night in a saloon?
A. I was.
Q. Then you have been back there since, haven't you?
A. What time do you mean?

Q. Last Saturday night you were in Shenandoah in a saloon talking about this case, weren't you?
A. I was, that is true.
Q. Did you have a talk with Mr. Usdavenas, who was there in the saloon with you?
A. I did.
Q. Did you tell him you would give him $500 if he would come down here and testify for you in case you won this case?
A. No.
Q. Did you have any talk with him at all?
A. I did speak to him, yes.
Q. What did you say to him?
A. I merely asked him how he was getting on with his work, how his health was and how the rest of the boys *was*, that is all the conversation I had with him.
Q. What did you go to Shenandoah for?
A. I went down to bring some witnesses over here.
Q. Mr. Usdavenas was one of them who was right on the job, wasn't he?
A. Yes.
Q. Did you say something to him about coming down as a witness?
A. I did.
Q. You remember that a little while ago you said you only asked about his health,—what did you say to Mr. Usdavenas about being a witness?
A. I merely told him "you *was* working with me, you are a fellow workman, you were there when I was injured, you know all about it, you are surprised to see I get some money from the company because I am injured.
Q. Why didn't you tell us about that before?
A. Because I was not asked to say that.
Q. Let me refresh your recollection. Didn't you tell him that you would give him $500 if you won this case if he would come down and testify for you?
A. No, I did not tell him that.
Q. You say Mrs. Mulikoli is a cousin of yours?
A. Yes.
Q. And Anthony Smullock is her husband?
A. Yes.
Q. He was a miner in Pennsylvania too, wasn't he?
A. He was.
Q. He got hurt in the mines too, didn't he?
A. Yes.
Q. And he came down to Yonkers to live, didn't he?
A. Yes.
Q. He has a suit against the company, hasn't he?
A. I don't know if he did or not.
Q. Do you know Linkinitz?
A. No.
Q. Don't he live with Smullock in the same house?

A. I don't know who is around there, I can't see with my eyes, there are some men there but I can't see.

Q. Don't you know as a fact that he has got a suit and that Mr. Smullock is acting as guardian in that suit,—you have talked it over with him, haven't you?

A. I don't know anything about it.

Q. How many men are living down at this boarding house or place?

A. I don't know who resides there, I can't see.

By the Court:

Q. How many board there?

A. I know Mr. Smullock, Mrs. Smullock and myself, that is all that I know.

By Mr. Brown:

Q. Do you know Mr. Alexander Zpopi?

A. No.

Q. Do you know Krupli?

A. No.

43 Q. Did you ever hear of Nathan Morcovade?

A. No.

Q. Do you know Anthony Perciak?

A. No.

Q. Do you know Iwnasoks?

A. No.

Q. Isn't he living there?

A. I don't know.

Q. How about Sacripanti?

A. I don't know anything about it.

Q. Do you pay any board there?

A. No.

Q. Your cousin's husband supports you, does he?

A. I don't pay anything, I don't get my board there.

Q. What did you come down to New York for?

A. When I was well and healthy, when I used to live there, when I paid money to people they kept me there, when I got injured, I didn't know anybody there I haven't anyone in Pennsylvania, and Mr. Smullock come there and I told him what happened to me, and he took me with him.

Q. Down to New York?

A. He took me to Yonkers.

Q. Did he say you could start a suit there against the company and try it down in Westchester County?

A. No.

Q. When did you first get the idea of starting the suit?

A. It was a nice day, it was a warm day in the summer time, and I was out on the porch, and some people come along and asked me what happened to me, and I told them, and they told me, "why don't you sue the company"? I don't know nothing about it. They were good people, and they went to work and got me this lawyer.

Q. Where were you on this day when you were sitting on the porch?

A. In Yonkers.

Q. How long had you been living here before this nice day
44 came along?

A. A little over a month.

Q. You belong to the union up there in the mines?

A. I was at that time, yes.

Q. During the time you had been in Pennsylvania you had acquired some friends among the miners, among the men who belonged to the union?

A. No, sir, I did not have any friends, the only reason I did belong to the union was because I could not work unless I would be a union man.

Q. What friend did you have in Westchester County beside Mr. Smullock?

A. That is the only person I knew was Mr. Smullock.

Q. Who were the people who came up to you when you were sitting on the porch and said you had better sue the company?

A. I don't know who they were, I don't know their names, I cannot see their faces, I cannot see anything.

Q. Who did they say they were, were they strangers?

A. They were not my friends, they were strangers to me.

Q. Did you ever see these men again who advised you to bring this suit?

The Court: He says he did not see them, he cannot see them.

Q. Did you ever meet them?

A. How can I see them when I can't see.

Q. You have your ears, did you ever talk to that man again?

A. I don't know the people who come along and talked to me,—they come along and talked to me and I answered them, but who they are I don't know.

Q. What lawyer did they take you to?

A. They presented me first off to some American lawyer,
45 and I refused because I can't talk good, and then they presented me to Mr. Machinski, because I can talk to him.

Q. Your cousin's husband had a suit pending against this company at the time you came to New York, didn't he?

A. I don't know anything about it, whether he has any law suit or not.

Q. You knew he had been injured in the mines, didn't you when you came here?

A. I don't know, when I come on he showed me he lost his arm, that is all I know.

Q. He was injured in some mine at the time you came down to live with him?

A. Yes.

Q. And Mr. Machinski was his lawyer, was he not?

A. No.

Q. You say Mr. Machinski is not the lawyer for Mr. Smullock?

A. He never told me that Mr. Machinski was his attorney.
Q. Did he tell you that Mr. Manton was the attorney?
A. I don't know about any English name.
Q. I want you to tell this jury whether when you first came down here to New York Mr. Smullock didn't take you right to a lawyer and tell you to start this suit the first thing?
A. No, sir, he never took me out from the house, he did not take me to any place.
Q. What do you intend to do after this suit is tried?

Mr. Manton: Objected to as immaterial.
The Court: Do you mean where he intends to live or work?
Mr. Brown: Yes.
The Court: Objection overruled.

46 A. If I would get something I would remain in Yonkers, I cannot go no place, I am blind, I will remain in Yonkers.
Q. You don't get any better living in Yonkers than you did back in the mining region, do you?
A. What can I do when I am blind? When I had a little money I supported myself, but whoever gives to me now a piece of bread I am thankful, because I lost my eyes.
Q. If you win this suit are you going to continue to live in Yonkers?
A. Yes.
Q. You will continue to live with your cousin who will support you?
A. Yes.
Q. Do you know Mr. Machinski's father?
A. I do not.
Q. You never heard of him?
A. I heard Mr. Machinski had a father, but I never seen him, I heard of him.
Q. Mr. Gilbert, see if you recall this: Didn't Mr. Machinski's father, a miner in Pennsylvania, come to you with a man with one hand gone, and say that that man had recovered a judgment in Westchester County and wanted you to come down here?
A. Mr. Machinski's father was not there, but Mr. Smullock came around and told me I should come to Yonkers.
Q. That was up in Pennsylvania?
A. Yes.
Q. What did he say you should come down for?
A. I told Mr. Smullock my troubles, the way the injury happened to me, and I cannot see in my eyes, and I am in people's way, and he said "you come to Yonkers and stay with me, my wife is your cousin."
Q. But he didn't say anything about beginning a suit?
A. No, sir, he didn't say anything.

47 DANIEL O'ROURKE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Manton:

Q. What is your business?
A. I am at the present time walking boss on this new subway work in New York City.
Q. Where do you live?
A. Tuckahoe.
Q. How long have you been blasting?
A. For thirty years I have been blasting.
Q. Have you had to do with drilling holes and charging dynamite?
A. Yes.
Q. Stick dynamite and powder dynamite?
A. Yes.
Q. Give us some of the places you have worked?
A. The canal started at Chicago, Panama Canal, George A. Fuller Company, New York City, four years, O'Rourke Engineering Company, United Engineering Company, Richard Carvel Company, Snare & Triest, and several others.
Q. Have you worked up in the mines in Pennsylvania?
A. Yes.
Q. How long ago?
A. Twenty years ago.
Q. Have you had to do with blasting and discharging dynamite in rock formations?
A. Yes.
Q. And coal formations?
A. Yes, sir.
Q. Is there a well known practice and custom with reference to inspecting holes after a blast has been discharged?
A. We always inspect a blast afterwards.

Mr. Brown: I object to that and move to strike it out.
Mr. Manton: I withdraw it.

48 Q. Was there or not before the 15th of October, 1915, a well known method and practice respecting holes after a discharge was set off, where holes had been drilled and dynamite put in for blasting purposes?

Mr. Brown: I object. What experience did he have in the Anthracite Mining region?
The Witness: Around Avondale, Pennsylvania.

By the Court:

Q. How many years were you in coal mining?
A. Not so long in coal mining.
Q. Have you had some experience in Anthracite Coal mining?
A. Yes.

By Mr. Brown:

Q. What mine were you working for?
A. It was a mine in Missouri.
Q. That is the extent of your coal mine experience?
A. No, I was in the quarries in Pennsylvania.
Q. We are talking about coal mines——

By Mr. Manton:

Q. Was there a well known practice and custom on or before the 15th of October, 1914, with reference to inspecting holes after a blast had been set off, after a hole three feet or more had been drilled and stick dynamite placed in it and a fuse, the fuse lighted?

49 Mr. Brown: I object to it.
The Court: Yes, it should relate to coal mines.
Mr. Manton: I think not, your Honor, blasting is universally the same.
The Court: That may be, but I do not think you can assume it is the same; blasting trap rock I think is quite different from blasting coal.

Q. Have you blasted any rock and any cement stratas?
A. Yes, sir.
Q. And in coal strata?
A. Not so much in coal.

By the Court:

Q. Have you blasted some in coal?
A. Yes, some.

By Mr. Manton:

Q. Was there a well known method of inspection after a blast wa set off? (No answer.)

By the Court:

Q. Is there any difference in the manner of making the holes?
A. No, sir, not a particle, it is all the same way when you are i tunnel work.

By Mr. Manton:

Q. Was there on or before the 15th of October, 1914, a well know method of inspection?
A. Yes, sir.
Q. In mines where holes were drilled in the coal strata,
50 rock strata, a distance of three feet or more in depth, an where sticks of dynamite was loaded and a fuse attached an afterwards discharged, and a fuse afterwards lighted?

Mr. Brown: I object to it as immaterial, irrelevant and incomp tent.
Objection overruled.

Mr. Brown: The witness has not shown experience in coal mines so he can testify as an expert, and this is all regulated by Legislation.

Objection overruled.

Exception by Mr. Brown.

A. Yes.

Q. What was it?

A. The custom is after a blast has been fired to make an examination of the rock where the blast was and look it over and see if any of the holes misfired.

Q. Then what?

A. The general custom is to drill a hole eighteen inches or two feet away from the hole that misfired and load that and shoot it off.

Q. Is there some collection of gases after a stick of dynamite has been fired?

A. Yes. There are a great many premature——

Q. No, no, is there a collection of gases?

A. Yes.

Mr. Brown: I move to strike that out.

Motion denied.

Exception by Mr. Brown.

Q. In what method does that gas escape?

A. Through the seams of the rock. Gases can get into the hole that didn't go off and explode it.

51 Q. Those blasts that didn't go off?

A. Yes, where one goes off. I have seen it in fifteen or twenty minutes.

Q. How near were the holes together?

A. Five feet, maybe ten feet.

Q. Where one hole is discharged and the others not gases might discharge, or gas can set off the others?

A. Yes.

Q. Within what period of time?

A. I have seen it run twenty minutes and I have seen it run two or three hours afterwards, and four hours.

Q. Is there a method of examining afterwards by means of tamping with a wooden stick?

A. Not where you use hemp fuse or cotton fuse.

Q. Describe to the jury the method of examination, how do you find out whether all the holes have been discharged or not?

A. Most generally the old hole would be there with the fuse still in it, and you can see that the hole has not been exploded, where the hole had been drilled and loaded.

Q. So by examination you can discover whether or not dynamite remains unexploded?

A. Yes, sir.

Cross-examination by Mr. Brown:

Q. I don't understand you to say that when one blast goes off the gases from this explosion will permeate the little cracks of rock and set off the other dynamite?

A. Yes.
Q. The gas that does that has to be pretty hot, doesn't it?
A. Hot enough to set off dynamite.
Q. It has got to be a flame, hasn't it?
A. No, sir.
Q. How hot has it got to be in order to touch off dynamite four feet away?
52 A. Quite hot. I couldn't tell you the exact temperature of it, but quite hot.
Q. That stays the same way four hours?
A. Yes, sir, working through the crevices of rock.

Mr. Manton: We rest, reserving the right to call the Doctor if he comes in.

The Court: Yes.

Mr. Brown: I move to dismiss upon the ground that the plaintiff has failed to show any negligence on the part of the defendant, and that as a matter of law the plaintiff has shown that he was guilty of contributory negligence; that the plaintiff's act, as claimed by him, in going to the place of this breast after an explosion had occurred was an express violation of the statute, which he is presumed to know, and therefore he cannot recover; that under the statute of Pennsylvania, as offered in evidence, and applying the law of Pennsylvania thereto, this plaintiff has not made out a case.

The Court: I will submit the case to the jury, and if necessary I will take your briefs upon the questions of law. I will submit the questions of negligence and contributory negligence, and at the present stage of the case I think there is nothing to submit to the jury on the question of the plaintiff's residence.

Mr. Brown: I offer in evidence the following portions of the laws of Pennsylvania, to wit, the Act of June 2, 1891. The enacting clause, an Act providing for the health and safety of persons
53 employed in and about the Anthracite Coal Mines of Pennsylvania, and for the protection and preservation of property connected therewith. Article 8, Sections 1, 2, 4 and 6. Article 12, Rules 1, 2, 12, 32, 34, 48 and 56. Article 18,—the first five paragraphs of Article 18. I offer the whole of Article 18. I offer the Act of July 15, 1897, relative to certified miners. I offer the enacting clause of the Act of July 15, 1897, Sections 1, 5 and 6. The Act of May 29, 1901, Section 7. The Act of 1891, June 2, Article 17, Sections 1, 3 and 4. I offer in evidence a decision of the Supreme Court of Pennsylvania, Durkin vs. The Coal Company, 171 Pa., 193; Golden vs. The Mt. Jessup Coal Company, 225 Pa., 164; Dempsey vs. ——, 227 Pa., 571; Jorka vs. Berwind White Coal & Mining Co., 231 Pa., 164; Hood vs. Connell, 231 Pa., 647; Watkins vs. Lehigh Coal & Navigation Company, 240 Pa., 419; Rau vs. Pittsburgh Co., 54 Pa., Superior 579; Riley vs. Pittston Coal Co., 234 Pa., 236.

Mr. Manton: I want to put in some Pennsylvania authorities now for the purpose of summing up, you have no objection?

Mr. Brown: Objection to your putting in Pennsylvania authorities?

Mr. Manton: Yes.

Mr. Brown: No, I have no objection to that.

Mr. Manton: Well, I will give you a list of them.

54 JOHN USKEVEDAS, called as a witness on behalf of the defendant, being duly sworn, testified, through an interpreter, as follows:

Direct examination by Mr. Brown:

Q. Were you working up there as a laborer along with John Gilbert at the time of this accident?

A. Yes.

Q. Do you remember when this one shot went off?

A. Yes.

Q. Were you all three outside then?

A. When the first one went off.

Q. You were all three outside then?

A. Yes.

Q. The other shot had not gone off then?

A. No.

Q. What did Mr. Gilbert do after this first shot went off?

A. When the first shot went off he waited about two minutes and then went in again.

Q. What did you do?

A. I was going in after him, but I didn't go in the place.

Q. Did you say anything to Gilbert?

A. I says "wait until the smoke gets over."

Q. Did Gilbert say anything to you?

A. He said "I am going in and light the other hole and the smoke will come out at the same time." He says, "I don't think the other hole was lit."

By the Court:

Q. Who said this?

A. Gilbert.

By Mr. Brown:

Q. Had you lit these two holes, or who had lit them?

A. He lit the two of them.

55 Q. Did you see this plaintiff up in Shenandoah in a saloon last Saturday night?

A. Yes.

Q. Did he make you any offer to pay you some money to come down here and testify?

A. He didn't promise me any, only he said, "I will pay your fare over and back."

Q. Nothing was said about $500 then?

Mr. Manton: Objected to as leading.

Objection overruled.

A. He said when I win then——

By the Court:

Q. Then what?
A. When I win then you will get $500.

By Mr. Brown:

Q. Do you belong to the same union he does?

Mr. Manton: I object to it as immaterial.
Mr. Brown: I withdraw it.

Cross-examination by Mr. Manton:

Q. Do you work for this company now?
A. Yes, sir.
Q. Last Saturday night Gilbert asked you to come down, and he said he would pay your carfare here and back?
A. Yes.
Q. And you said you wouldn't come, that you were coming down with the company, didn't you?
A. I didn't say that, I said "when they call for me I will come."
56 Q. When the company calls for you you would come, is that what you said?
A. Yes. I said that I would come when I get the word, whether the company or anybody, when they notify me to come.
Q. He told you the case was coming up in Court yesterday or today, and asked you to come down with him on Saturday or Sunday didn't he?
A. He told me Tuesday or Wednesday.
Q. And he asked you to come down with him,—he went up to get you to bring you down as a witness?
A. He asked me to come down, but I didn't want to come.
Q. You wanted to come down with the company, didn't you?
A. No.
Q. You didn't want to come down with him, is that it?
A. I didn't want to come with him because I would miss my shift and I says to him, "who is going to pay me for the shift that I miss.
Q. Do you know this man (indicating)?
A. Yes.
Q. What is his name?
A. Joe Macejunas.
Q. He lives in Shenandoah and works in the mine, don't he?
A. Yes.
Q. He works for the same firm, for the same company?
A. At that time, yes.
Q. Do you remember your speaking to him right after the accident happened, and you said to him "It was a terrible accident and that damn fool miner should never have sent him in there without examining it first."
A. Yes, sir.

Q. Did you say that to this man?
A. Yes.
Q. That was true, right after the accident happened that you told this man who stood up then that the miner should not have sent him in without examining it first, you told him that, didn't you?
A. I just says he had no right to go.

57 By the Court:

Q. You said who had no right to go?
A. John.
Q. John who?
A. Gilbert.

By Mr. Manton:

Q. This man is a countryman of yours, isn't he?
A. We are from Russia, but not from the same State.
Q. You speak the same language, don't you?
A. Yes.
Q. L*a*th-anian.
A. Yes.
Q. He was one of your neighbors up there in Shenandoah, wasn't he?
A. I am living with him now.
Q. You live in the same house with him?
A. Yes, sir.
Q. Do you remember telling this man right after the accident happened that it was a terrible accident and that McCormack, or the miner, the damn fool had no right to send him in without going in there first and examining it.

(No answer.)

The Court: Make the question short.

Q. Did you tell him this man McCormack was a damn fool to send Gilbert in there when he went in?
A. No, he didn't send him in.
Q. Did you say that to this man?
A. No.

By Mr. Manton:

Q. Didn't you say you did when I first asked you that?

58 Mr. Brown: I object, the question was double barreled.

Q. You have been talking with some of the men before you came here about your testimony?
A. I told himself that what I seen I would tell.
Q. Who do you mean by himself?
A. Joe and Gilbert.
Q. Joe is the man you live with?
A. Yes.
Q. Did you talk with this man who is now interpreting for you?

A. What?

Q. About your testimony here, what you would swear to, just answer my question.—did you talk to this man who is acting as interpreter now about your testimony here?

A. I said that I would tell the truth.

Q. Did you tell him what the truth was, how it happened, or anything about it?

A. I am saying it now, what happened.

Q. Did you also tell Joe, the man you live with, that you could win or lose the case for Gilbert according to what you wanted to say?

A. No.

Q. On this day in the mine there were just three of you, McCormack, the miner, you as a laborer, and Gilbert as another laborer, isn't that so?

A. Yes, sir.

Q. On the morning before the accident you had just drilled holes, isn't that so?

A. First we loaded a car.

Q. Then you both started to drill holes, you and Gilbert?

A. Yes, sir.

Q. And then you and Gilbert loaded dynamite in the holes, didn't you?

A. I bored and Gilbert tamped the holes himself.

Q. Didn't you help put dynamite in the holes, too?

59 A. No, he tamped the holes while I was finishing boring the other holes.

Q. He couldn't tamp the second hole until it was bored, could he?

A. I finished it when he had the other one tamped.

Q. You only bored two holes there?

A. Yes.

Q. And you tamped two holes?

A. Yes.

Q. What were you doing while he was tamping the second hole?

A. He told me to take the tools away so the shot wouldn't touch them.

Q. It didn't take you long to take the tools away, did it?

A. He finished the tamping of the second hole.

Q. Where did you take the tools to?

A. Outside.

Q. About fifty feet or so?

A. No, not that.

Q. How much?

A. I can't say, on the side there, we put them behind the rocks.

Q. Did you take them further than the end of this courtroom?

A. It wasn't that much.

Q. What you took was the drill, you picked it up in your hand and put it back about thirty or forty feet away?

A. From where he took the drill?

Q. From where you were working with it I suppose?

A. We were not drilling holes with the drill.

Q. What were you using?

A. A starter.
Q. The starter you picked up and carried away thirty or forty feet, didn't you?
A. It wasn't that much, it wasn't far.
Q. About twenty feet?
A. Maybe it was and maybe it wasn't that much, I can't tell.
Q. That is all you did, was to pick up this tool and move it about fifteen or twenty feet, and while you were doing that you say Gilbert was tamping the hole, is that right?
A. Yes, sir.
Q. He did the work while you walked fifteen or twenty feet?
A. Yes, sir.
Q. In tamping the hole you have to put in some ten or twelve sticks of dynamite, don't you?
A. What do I know about that.
Q. Don't you know? How many sticks——

By the Court:

Q. How many sticks of dynamite did Gilbert put in each hole?
A. In one hole three and in one hole two and a half.

By Mr. Manton:

Q. You do know something about it? How did you put it in, with a wooden stick or how?

Mr. Brown: I object; he didn't put it in.

Q. How did Gilbert put it in?
(No answer.)

By the Court:

Q. Did you put it in,—did you put in any of the dynamite?
A. No, sir.

Mr. Brown: I object to this on the ground that I called this witness to prove one thing that he told Gilbert to keep out, and now he makes him his own witness.
Objection overruled.

By Mr. Manton:

Q. When he put the dynamite in did he have a wooden stick to pound it down?
A. Yes, he had a short one from a broom.
Q. Were you working in the mines just as long as Gilbert was working there?
A. I worked longer.
Q. You were working under this miner, McCormack, longer than Gilbert, weren't you?
A. Yes, sir.
Q. And you didn't touch the dynamite, but Gilbert touched it, that is what you want the jury to believe?
A. Then, you mean?

Q. Yes.
A. Or at any time?
Q. Before Gilbert was hurt did you put the dynamite in the hole?
A. Before that I dropped the dynamite twice.
Q. Did you put it in the hole and tamp it?
A. Yes, sir.
Q. Did you set it off?
A. Yes, sir.

Recess until 1:30.

After Recess.

THOMAS MCCORMACK, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Mr. Brown: I offer in evidence the record upon the application to dismiss this suit made at Special Term.

Mr. Manton: I object to it a sincompetent, irrelevant and immaterial.

The Court: I do not think it is a proper part of the record of this trial.

Exception taken by Mr. Brown.

62 Mr. Brown: Mark it for identification.

Marked Exhibit A for identification.

Mr. Brown: I also offer motion to dismiss this suit served upon this gentleman December 16th.

Mr. Manton: I object to it as incompetent, irrelevant and immaterial.

Objection sustained.

Exception by Mr. Brown.

Mr. Brown: Mark it for identification.

Marked Exhibit B for identification.

Direct examination by Mr. Brown:

Q. Mr. McCormack, were you in charge of this gangway at the time of the accident?
A. Yes.
Q. Were you a certified miner?
A. Yes, sir.
Q. Have you your certificate here?

The Court: There is no dispute about that?
Mr. Manton: No.

Q. Did you have as a laborer Gilbert, the plaintiff?
A. Yes.
Q. And Mr. Usdavenas, his coal laborer?
A. Yes, sir.
Q. And you were driving this gangway?
A. Yes, sir.

By the Court:

Q. Driving the gangway means that you were excavating a tunnel?

A. It was coal work.
Q. I say a tunnel in the coal?
A. Yes, sir.

63 By Mr. Brown:

Q. It went in from the surface of the ground, this tunnel, started to go in from the surface?
A. Yes, sir.
Q. It went down on a slight slant?
A. Yes, sir, about three degrees.
Q. You had gone in how far?
A. About twenty-five feet I guess.
Q. Setting up timbers as you went along?
A. Yes, sir, every five feet.
Q. Were you in so far that you had to use miner's lamps to work with, or could you see by daylight?
A. We only used lamps in case of firing.
Q. To fire shots?
A. Yes, sir.
Q. There was no gas there?
A. No, sir.
Q. You were working that morning with these two men?
A. Yes, sir.
Q. You had drilled a couple of holes, hadn't you?
A. Yes, sir.
Q. Who charged them?
A. John Gilbert.
Q. Did he charge them both?
A. Yes, sir.
Q. Were you there?
A. Yes, sir.
Q. Who set them both off?
A. John lit both holes.
Q. Those holes were charged with dynamite, did the fuse stick out?
A. Yes, sir.
Q. And you shoot it off by lighting the end of the fuse?
A. Yes, sir.
Q. After starting one going you go over to light the other?
A. Yes.
Q. What did you do, all of you?
A. After the fuse was lit all three got out.

64 Q. Did you go out on the surface?
A. Yes, sir.
Q. One of the shots went off while you were out there?
A. Yes, sir.
Q. What happened right after that?
A. The first notice I took was John going to go in to see what was the matter with the second hole, and I hollered at him to stay back, and I put my hand that way (indicating) to warn him to come back, I said, "the whistle is blowing now, go and eat your dinner, we will

see about it after." The other laborer did make a motion to take his can.

Q. His dinner can?

A. Yes, they were right there where they were standing, and John instead of going to his can he turned around, and when I see he was determined to go in I run down from where I was standing and kept hollering at him to come back, to come back, and he still continued on in, and when I saw him he was just about to be in there when the shot went off.

Q. Was there a car in there?

A. Yes, sir.

Q. Did you follow in this gangway at all?

A. Yes, I was at the second set of timber when the shot went off.

Q. Was the car ahead of you?

A. Yes, that saved me from getting probably some of it too.

Q. He didn't stop at all?

A. No, he had his back turned to me, and I kept hollering at him to come back. I thought the fuse might be burning yet.

Q. Was this pay day when this happened?

A. Yes.

Q. When did you expect to finish that shift?

A. As soon as we got this other car loaded.

Q. You would have taken this coal that you had blown
65 loose and put it on the car?

A. It didn't make quite a car full.

Q. Did you hire this man yourself, or your partner?

A. My partner brought him out.

Q. You had another certified miner working with you?

A. Yes, sir.

Q. These men were carried on the payrolls of the company?

Mr. Manton: I object.

Mr. Brown: I withdraw it.

Q. How many years have you had your certificate?

A. I got one, the first issued, about 1888.

Q. You have been a miner ever since?

A. Yes, sir.

By the Court:

Q. You were in the employ of the company, were you?

A. Yes, sir.

Q. The Philadelphia & Reading Coal & Iron Company?

A. Yes, sir.

Q. And you were paid by that company?

A. Yes, sir.

Q. And you were John Gilbert's boss there, were you?

A. Yes, sir.

Cross-examination by Mr. Manton:

Q. He had been with you for eight or nine days working?

A. I think he was on the ninth day.

Q. He got paid by the day?
A. Yes, sir.
Q. You were to quit that day at three o'clock?
A. As soon as we got that car loaded.
66 Q. Wasn't the time fixed when you started in when to quit?
A. No.
Q. What time did you start in that day?
A. I guess half-past seven.
Q. And you would work up to three o'clock?
A. Sometimes we quit at two o'clock, and half-past two.
Q. Didn't you have the eight hour day or ten hour day?
A. Whenever we would get our shift done we would quit.
Q. You didn't expect to quit until two or three o'clock?
A. No, sir.
Q. The men in the meantime were going to get their lunch?
A. Yes, sir.
Q. Although it was lunch time, the bell had rung, or announcement was made for dinner, this man wanted to go in and work some more?
A. Yes, sir, he was anxious——
Q. Anxious to work during the lunch hour?
A. He wanted to see this other hole go off I guess.
Q. You shouted to him to come back?
A. Yes, sir.
Q. Good and loud I suppose?
A. Yes, very loud.
Q. A good loud voice, there was no trouble about hearing it?
A. No, sir.
Q. You kept shouting that more than once?
A. Yes, sir.
Q. How many times do you think you shouted to come back?
A. Four or five times.
Q. Although you shouted four or five times in a loud voice he continued to go in?
A. Yes.
Q. When you shouted to him you were pretty close to him were you?
A. I was running towards him all the time.
Q. You were running to him and shouting for him to come back?
A. Yes, sir.
67 Q. And although you did that he continued to go in?
A. Yes.

By Mr. Brown:

Q. How far were you away from him at the time this first blast went off?
A. I was about under the second set of timbers.
Q. I mean when the first shot went off?
A. I guess I was over one hundred feet from him.
Q. Did you ever tell that man Gilbert to go in there and examine that blast while you stayed outside?
A. No, sir.

JAMES P. MCDONALD, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. Were you superintendent of this colliery at the time of this accident?
A. Yes.
Q. Did you have charge of this and some others?
A. Yes, I had charge of four more.
Q. On behalf of the defendant?
A. Yes.
Q. Who was the mine foreman in charge of this particular gangway where Mr. Gilbert was hurt?
A. Guylliam Jones.
Q. He had charge of this gangway?
A. Yes.
Q. What were his duties?
A. To look after the protection of the men, see that they were provided with good ventilation, and that the rules and law governing the colliery be complied with.
Q. Did you control him with regard to those duties at all?

68 Mr. Manton: I object.
The Court: The witness may tell what he did with respect to the other men.

Q. I will ask you if you interfered in any degree with the functions of this man Jones?

Mr. Manton: I object.
The Court: I think the witness should tell what the man did first.
Mr. Brown: He testified as to what Jones' duty was.

By the Court:

Q. Had you any control over him?
A. Who?
Q. Jones.
A. I had in certain lines of work.

By Mr. Brown:

Q. What did you tell him to do?
A. If any new work was to be started, or anything of that kind he always looked for my opinion on it.
Q. As to where he should work?
A. In my judgment if it would be advisable to carry on that work at that time.
Q. When it got actually to the process of mining did you interfere with him in any degree?
A. No, sir.

By the Court:

Q. Who did he work for?
A. Jones?
Q. Yes.

Mr. Brown: That is a question.

Q. Paid by the Philadelphia & Reading Company?
A. Yes.
Q. The same company that paid you?
A. Yes.

69 By Mr. Manton:

Q. He was on the payroll of the company, on their books, just as you were?
A. He was on the payroll of the colliery, yes, sir.
Q. Paid by the week or month?
A. By the month.
Q. He has a stated salary?
A. Yes, sir.
Q. How much each month?

Mr. Brown: I object.
The Court: It is not material.

Q. He was paid by the month a stipulated amount?
A. Yes.
Q. And you were paid the same way?
A. Yes.
Q. And the miners were paid the same way?
A. Yes,—the miners are paid off by what they earn.
Q. That is, they are paid by the company, they are on the payroll of the company?
A. Yes.
Q. And you are all paid by the same company?
A. Yes, but I ain't on the same payroll he is.
Q. You are paid by the same company?
A. Yes, sir.

GYLLIAM JONES, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. Were you the mine foreman in charge of this gangway where the plaintiff was injured?
A. Yes.
Q. At that time?
A. Yes.
70 Q. At that time you had a certificate as mine foreman?
A. Yes.
Q. Have you got your certificate here?

The Court: There is no dispute about that.

Q. You were examined by the State and certified as mine foreman under the Act?
A. Yes.
Q. Did you hire this man Gilbert?
A. Yes, sir.

Q. Did you hire this man McCormack?
A. I did,—that is, I give him a job.
Q. You didn't figure up the rate?
A. There is no rate, only according to the amount of work he does.
Q. He hired these men himself?

Mr. Manton: I object.
The Court: What difference does it make?
Mr. Brown: It doesn't make any difference.

Q. Did you have exclusive charge of this colliery in which this gangway was located?

Mr. Manton: Objected to.
Objection overruled.
Exception by Mr. Brown.

By the Court:

Q. Did you have full charge?
A. I had full charge of that colliery.

By Mr. Brown:

Q. That is, the underground working?
A. Underground working.
71 Q. Mr. McDonald was the superintendent of the company there?
A. Yes.
Q. In the operation of doing the mining and the control of the underground work of this mine did Mr. McDonald interfere with you in any degree?

Mr. Manton: I object.
Objection overruled.
Exception by Mr. Manton.

A. He did not.

Mr. Manton: I have no questions.
Mr. Brown: We rest.

JOE MACEJUNAS, called as a witness on behalf of the plaintiff, being duly sworn through an interpreter, testified as follows:

Direct examination by Mr. Manton:

Q. Did this man live with you, John Usdavenas?
A. Yes.
Q. Shortly after this accident to John Gilbert did he live in your house?
A. Yes.
Q. In a conversation with you shortly after the accident did this man who has just stood up here say to you that it was a terrible accident and that the damn fool McCormack had no right to send the plaintiff John Gilbert into this place until he had examined it?
A. Yes, sir.

Q. Did this same man say to you here a few days ago that Gilbert could win or lose the case according to the way he gave his
72 testimony?

A. He didn't say so.

Q. Did he say that in words or substance?

Mr. Brown: I object to it.

Objection sustained.

Q. What did he say?

Mr. Brown: I object to it, it is not in rebuttal.

Objection sustained.

Testimony closed.

Mr. Brown: I move to dismiss the complaint, and ask your Honor to direct a verdict for the defendant, because it is apparent that the plaintiff is not a bona fide resident of New York, and that it is apparent from the proof that he came here for the sole purpose of maintaining this suit in this State, and the Court under such circumstances has the right to refuse to entertain jurisdiction of the case. That it is now apparent from the proof that this miner was in charge of a representative of the State, a certified mine foreman, with whom this defendant could not under the law interfere; that it is not liable for the negligence of any person operating under those circumstances. That the cause of action that is now sought to be enforced here in New York has not the slightest relation to
73 any business transacted by the defendant in this State, and that this suit cannot be maintained in this State under those circumstances, and jurisdiction should be refused. Upon the plaintiff's own showing he has been guilty of the violation of the specific provision of the Mining Law. That no person acting as agent or foreman under this defendant has authority or legal right to direct any person to commit a violation of the law,—invoking Rule 34 of the Mining Law.

The Court: I will reserve decision. I will take the verdict of the jury on the questions of negligence and contributory negligence.

Mr. Brown: I am going to ask your Honor to submit these two questions to the jury: First, was the plaintiff at the time of the commencement of this action a bona fide resident of New York? Second, was the sole purpose of the plaintiff leaving Pennsylvania and coming to New York to bring this action.

The Court: I think there is no evidence to justify the jury in finding that the plaintiff was not a bona fide resident of New York at the time of the commencement of this action, and I think the purpose of his coming here is not material.

Mr. Brown: And to that I except. May I ask that in the summing up here I might address myself to this testimony of his with respect to his residence to challenge his credibility.

The Court: You may refer, of course, to all his testimony, all that he said on direct and cross-examination with respect to his residence and his purpose in coming here.

74 Mr. Brown, on behalf of the defendant, and Mr. Manton, on behalf of the plaintiff summed up the case to the jury.

Charge of the Court.

TOMPKINS, *J.:*

Gentlemen of the Jury: On the 15th of October, 1914, while the plaintiff was in the employ of the Philadelphia & Reading Coal & Iron Company, in one of its coal mines in the State of Pennsylvania, he was very severely injured by an accidental explosion of a charge of dynamite. His injuries are concededly very serious, but that fact, gentlemen, that he received those injuries while in the employ of this defendant, does not of itself entitle him to a verdict in this case. The mere fact that he was badly hurt while he was engaged in his employers' business does not of itself make his employer liable.

Under the laws of the State of Pennsylvania, by which we are bound in this suit, because the accident happened there, the plaintiff is only entitled to a verdict if it be proved by a fair preponderance of the evidence that the accident was due to some carelessness or negligence on the part of his employer, or to some neglect of duty on the part of his employer, or on the part of his foreman, or his boss, for whose conduct the common employer is liable.

Besides that, before the plaintiff can recover in this case, he must also prove that there was no carelessness or negligence on his own part that contributed to bring about the accident and his injuries.

75 So that the plaintiff must prove two things before he can recover damages in this case, first, that there was carelessness or a violation of duty on the part of his employer, or on the part of some one for whose conduct the employer is liable, and, secondly, he must prove that there was no fault on his own part that helped to bring about the accident.

So that regardless of the character of the injuries, without reference to the serious character of the injuries, and putting aside altogether any feeling of sympathy that we may have for the plaintiff because of the deplorable condition in which he has been left by this accident, the first question is, is there liability on the part of the defendant? Under the law and the facts is the company, the employer, responsible for this accident?

It appears that in the State of Pennsylvania at the time of this accident there was a law which reads as follows:

"Before commencing work, and also after the firing of every blast, the miner working a breast (that means a certified miner) or any other place in a mine, shall enter such breast or place to examine and ascertain its condition, and his laborer (that is the plaintiff here), or assistant, shall not go to the face of such breast or place until the miner has examined the same and found it to be safe."

That law applied to this operation that was in progress at the time of this accident, and under that law it was the duty of McCormack, the certified miner, to examine that blast after the one hole was

76 discharged and it was known that the other had not been discharged. Under this law, it was McCormack's duty to examine the place where the undischarged hole had been

made, the one that had not gone off, to see if it was safe before sending the plaintiff into the mine.

The plaintiff's claim here is that the foreman, or the certified miner, failed to discharge that duty under this law; that when one blast went off, and it was known that the second had not discharged, instead of going in himself to make an inspection as required by this law, and find out whether the place was safe or not for further operations he carelessly, and in violation of this law, sent the plaintiff in to find out why that undischarged hole had not been discharged, and the plaintiff's claim is that there was a violation of this law on the part of the certified miner, who was the plaintiff's foreman, in not g-ing in himself to make a proper inspection, and to learn whether the place was safe or not for further work by the men working under him; and that he was also careless, and violated this law, in sending the plaintiff in, who was a laborer, not a certified miner,—in sending him in to make the inspection which the foreman ought to have made himself. That is the substance of the claim that the plaintiff makes.

So that the first question, gentlemen, for you to determine, is whether there was any violation of this law by this certified miner, McCormack, the foreman. Did he fail to do his duty under this law, and did he violate the law, and was he careless in sending the plaintiff into that tunnel which had been made in the coal, sending him into a place which he ought to have inspected himself, but failed to inspect, a place which was dangerous because of the undischarged blast?

77 The plaintiff's testimony, in substance, is that after the first blast was discharged McCormack told him to go into the place where these holes had been loaded with dynamite to see what the trouble was, and that he, the plaintiff, said to McCormack that he was afraid to go. Whereupon, McCormack said, "It is all right, time enough has elapsed to make it safe, it is all right to go now." In other words, that so much time had elapsed that the blast would not go off and it was safe to go in, and either unload the hole or attach a new fuse and light it. At all events, the plaintiff says that he told him to go in and do all that was necessary. That is the substance of the plaintiff's claim—that the foreman, whose duty it was to go in there and make an inspection and find out whether the place was safe, failed to do that, and that that was in violation of this law and further, that he violated the law by sending his assistant in to do what he ought to have done himself.

On the other hand, the defendant says that the certified miner, the foreman, McCormack, did not send the plaintiff into the mine, and McCormack himself has testified that he did not. McCormack says that he not only did not send him in to the mine, did not direct him to go in and do anything there, but that he warned him not to go, and commanded him not to go, and called to him repeatedly to come back when he was about to go there and see what the trouble was, and the other laborer, the man who was working with the plaintiff under McCormack, testified that McCormack did not send the plaintiff in to the undischarged blast. McCormack says

that he not only did not send him there, but that he warned
78 him not to go there; that he told him they could eat their lunch first and then see what the trouble was, and that when the plaintiff persisted in going in, he called to him several times to come back.

Gentlemen, these conflicting claims present the first question that you have to decide in this case, whether this foreman neglected to do his duty, whether he failed to make a proper inspection, and whether he violated the law by sending the plaintiff in there to this undischarged blast when he ought to have gone himself to see that the place was safe before sending or permitting his subordinate to go there.

If the plaintiff went there of his own accord, if he went in there without being directed by the foreman to go, and in spite of the foreman's warning not to go, of course he cannot recover anything in this suit. If the defendant's contention is true in that respect, the plaintiff's case fails, in that event he is not entitled to recover anything. If he went there without being told to go, and in spite of his foreman's warning not to go, he took the risk upon himself, he assumed whatever danger was incident to a thing of that kind, and he cannot recover.

So you see, gentlemen, the importance of determining this first question: Did the plaintiff go into that place because he was sent there by the foreman, or did he go of his own accord, and in spite of the foreman's direction not to go? If he went there of his own accord, he cannot recover. If the foreman, in violation of this law, failed to go himself, and sent the plaintiff to that undischarged blast to do what he himself should have done, one branch of the plaintiff's case has been made out.

79 The burden of proof rests upon the plaintiff. The plaintiff must satisfy you by a fair preponderance of the evidence,—that is, by the greater weight of proof, the more credible, the more convincing, the more trustworthy proof, which includes the circumstances and probabilities of the case as well as the words of the witnesses,—the plaintiff must satisfy you by a fair preponderance of all the proof that there was a violation of this law on the part of McCormack, by not going to the place of the blast himself to make an inspection to see that the place was safe, and in sending the plaintiff there. Unless the plaintiff has satisfied you of that by a fair preponderance of the evidence, there will be no other question for you to consider, because, in that event, your verdict will be for the defendant. But if you are satisfied by a fair preponderance of the evidence that McCormack violated this law by sending the plaintiff to make the inspection which he himself ought to have made, and that that was the cause of the plaintiff's injuries, then the next question will be, was there any carelessness on the part of the plaintiff himself. Did he by any careless act contribute to bring about this accident?

Gentlemen, the same law that I have referred to says that no laborer, or assistant, shall go to the place of such breast or place until the miner has examined the same and found it to be safe.

So that the law which it is claimed the certified miner violated, the

same law under which the plaintiff brings this action and charges the foreman with neglect, provides that the plaintiff himself should not go into that breast, so-called in the law, or the place where the undischarged blast was, until the certified miner had examined the same and found it to be safe.

80 So that the obligation rested upon the plaintiff to stay out of that place until he was satisfied that the certified miner himself had examined it and found it to be safe. So if you believe that without the foreman's direction the plaintiff went into that undischarged blast of his own accord in violation of this law, he cannot recover.

But the plaintiff's claim is that he was directed to go; that he was commanded to go by his foreman; that he violated the law in obedience to his foreman's command, and under those circumstances I am going to leave it to you to say whether there was such a violation of the law on his part, whether there was such negligence and carelessness on his part, as to defeat his recovery, in case you should find that there was negligence on the part of his foreman. I am going to leave it to you to say whether under those circumstances he failed to exercise ordinary care and prudence, whether there was carelessness and negligence on his part when he went in there in obedience to his foreman's directions. Under the circumstances, gentlemen, it is for you to say whether the plaintiff exercised reasonable care. In other words, whether he did what men of ordinary care and prudence would have done under similar circumstances.

The plaintiff is presumed to have known the law. The presumption is that every man knows the law. That may be an extreme presumption, or a violent presumption, to presume even that the Judges know all the law, because they do not, but the presumption of the law is that every man knows the law, and we are all bound by the laws whether we know them or not.

So that the plaintiff is presumed to have known that it was
81 against the law for him to go into that breast before the certified miner had examined it and found it to be safe, and yet he had at the same time, so he claims, his foreman's orders to do it, and he says that he did it pursuant to that order.

Under those circumstances, did he exercise such care as ordinarily prudent men exercise under like conditions and circumstances? I leave that to you, gentlemen, as a question of fact.

If there was carelessness on the plaintiff's part, if he was negligent, if he was at fault in having gone there in violation of the law before his foreman examined it and found it to be safe, then he cannot recover in this case, no matter how careless the foreman may have been. It is only in the event that you find that he was free from blame, free from carelessness, and that his foreman was to blame, and was at fault, that you can consider the question of the plaintiff's injuries and fix the damages, and upon both those questions the burden of proof rests upon the plaintiff.

If both these propositions have been made out by a fair preponderance of the evidence in favor of the plaintiff, you will fix a reasonable amount to compensate him for the physical injuries he received, and

for their consequences, and for the pain and suffering that he endured, and for all the future consequences of the injuries he then received.

The plaintiff is practically blind in both eyes; one eye is entirely gone, and the sight of his left eye is seriously impaired, and for four or five months he suffered from burns upon his face, and other parts of his body, and the claim is that he will never be able to work again; that he is premanently and totally disabled, and if this com-
82 pany is liable for his injuries, he is entitled to reasonable compensation for his past suffering, and for all his future suffering, and for his loss of earnings, and the reasonable cost of his maintenance and medical attendance, and for all the immediate and necessary consequences of the injuries he received.

But, gentlemen, the question of damages, the extent and nature of his injuries, are not to be considered at all until you have first settled the question of the defendant's liability. First, did the foreman violate the law? Did he send this man into that dangerous place instead of going himself, as the law directed him? The plaintiff says he did. The foreman says he did not. The foreman says that the plaintiff went in of his own accord and in spite of his directions not to go. If the defendant's contention is correct, your verdict will be for the defendant. If the plaintiff's claim is true, and he went there by the direction of his foreman, the next question is as to his own conduct, whether he was to blame for going in there or whether he was justified in going because his foreman directed him to go. When you have settled these two questions in the plaintiff's favor, and not until then, you will consider the question of his injuries and the damage.

Mr. Brown: I ask the Court to submit to the jury the question whether at the time of the commencement of this action the plaintiff was a bona fide resident of New York.

The Court: I will refuse to that.

Exception taken by Mr. Brown.

Mr. Brown: I ask your Honor to submit to the jury the question whether the sole purpose of the plaintiff in coming to New York was to bring this action.

83 The Court: Refused.

Exception by Mr. Brown.

Mr. Brown: I except to that portion of your Honor's charge where you said if the jury found the certified miner violated the law the plaintiff made out that part of the case, and to that part leaving it to the jury whether this violation of the law was or not—whether the plaintiff was justified in going in even if the jury should find that the certified miner ever gave him this direction; and I ask your Honor to charge that if the jury find that this defendant placed this mine under the control and supervision of a certified mine foreman, and had not interfered with the mine's control, it is not liable for the negligence of McCormack.

The Court: Refused.

Exception by Mr. Brown.

Mr. Brown: I ask your Honor to charge that even if the jury find

that the accident was caused by the plaintiff's obedience to the alleged action of McCormack before McCormack examined it and found it safe, their verdict must be for the defendant.

The Court: I leave it to the jury to say whether such an act on the plaintiff's part was a negligent and careless act or not.

Mr. Brown: I take an exception.

I ask your Honor to charge that the plaintiff had no legal right to go to the place of this breast when told to do so by McCormack.

The Court: I leave that to the jury.

Exception by Mr. Brown.

Mr. Brown: That unless the jury believe that the plaintiff
84 was directed by McCormack to go into this breast, their verdict must be for the defendant.

The Court: I so charge.

Mr. Brown: And the jury may consider in determining this question of fact that the plaintiff was the only witness in support of that assertion, and that he is an interested witness.

The Court: Yes, gentlemen, he is an interested witness.

Mr. Manton: The defendant's witnesses are interested, or may be found to be so.

The Court: Whether they are or not is for the jury to say.

The jury retired, and returned with a verdict in favor of the plaintiff, and assessed his damages at $10.000.

Mr. Davis (appearing for Mr. Brown): I move to set aside the verdict and ask for a new trial, because the verdict is contrary to the law, contrary to the evidence, against the weight of evidence, and on all the grounds set forth in Section 999 of the Code.

The Court: I will reserve my decision and take briefs.

The foregoing case contains all the evidence offered and received upon the trial of this action.

85 PLAINTIFF'S EXHIBIT 1.

Not Valid, Until Stamped by the Paymaster.
Page 94.
No. 24.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $8.67 in full for First Half of Oct. 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given to me by the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Oct. 16, 1914. Paymaster's Office, Pottsville, Pa.

7—1027

86 PLAINTIFF'S EXHIBIT 2.

Not Valid, Until Stamped by the Paymaster.
Page 90.
No. 15.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $19.01 in full for First Half of Jun- 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Jun- 16, 1914. Paymaster's Office, Pottsville, Pa.

87 Not Valid, Until Stamped by the Paymaster.
Page 42.
No. 24.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $4.71 in full for Second Half June 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Jul- 1, 1914. Paymaster's Office, Pottsville, Pa.

88 Not Valid, Until Stamped by the Paymaster.
Page 90.
No. 15.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $17.35 in full for Second Half Jun- 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

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89 Not Valid, Until Stamped by the Paymaster.
Page 42.
No. 24.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $16.00 in full for First Half Jul- 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Jul- 16, 1914. Paymaster's Office, Pottsville, Pa.

90 Not Valid, Until Stamped by the Paymaster.
Page 90.
No. 9.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $12.51 in full for First Half Jul- 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Jul- 16, 1914. Paymaster's Office, Pottsville, Pa.

91 Not Valid, Until Stamped by the Paymaster.
Page 42.

No. 24.

Ellangowan.

Name: Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $14.14 in full for Second Half Jul- 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

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THE PHILA. & READING COAL & IRON CO.

Audited Aug. 1, 1914. Paymaster's Office, Pottsville, Pa.

92 Not Valid, Until Stamped by the Paymaster.
Page 90.

No. 9.

Ellangowan.

Name: John Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $17.35 in full for Second Half Jul- 1914 wages.

(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

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Audited Aug. 1, 1914. Paymaster's Office, Pottsville, Pa.

93 Not Valid, Until Stamped by the Paymaster.
Page 43.

No. 23.

Ellangowan.

Name: John Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $2.36 in full for First Half of Aug. 1914 wages.

(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Aug. 16, 1914. Paymaster's Office, Pottsville, Pa.

94 Not Valid, Until Stamped by the Paymaster.
Page 94.

No. 3.

Ellangowan.

Name: Jno. Gilbert.

Received of The Philadelphia & Reading Coal and Iron Co. $12.51 in full for First Half Aug. 1914 wages.

(Sign here) JNO. GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Aug. 16, 1914. Paymaster's Office, Pottsville, Pa.

95 Not Valid, Until Stamped by the Paymaster.
Page 94.

No. 3.

Ellangowan.

Name Jno. Gilbert.

Received of The Philadelphia & Reading Coal and Iron Co. $8.67 in full for Second Half Aug. 1914 wages.

(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Sep. 1, 1914. Paymaster's Office, Pottsville, Pa.

96 Not Valid, Until Stamped by the Paymaster.
Page 43.

No. 23.

Ellangowan.

Name Jno. Gilbert.

Received of The Philadelphia & Reading Coal and Iron Co. $22.39 in full for Second Half Aug. 1914 wages.

(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.

GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.

THE PHILA. & READING COAL & IRON CO.

Audited Sep. 1, 1914. Paymaster's Office, Pottsville, Pa.

97 Not Valid, Until Stamped by the Paymaster.
Page 94.
No. 30.
Ellangowan.
Name Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $19.01 in full for First Half Sep. 1914 wages.
(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.
GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.
THE PHILA. & READING COAL & IRON CO.

Audited Sep. 16, 1914. Paymaster's Office, Pottsville, Pa.

98 Not Valid, Until Stamped by the Paymaster.
Page 45.
No. 3.
Ellangowan.
Name Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $9.43 in full for Second Half Sep. 1914 wages.
(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.
GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.
THE PHILA. & READING COAL & IRON CO.

Audited Oct. 1, 1914. Paymaster's Office, Pottsville, Pa.

99 Not Valid, Until Stamped by the Paymaster.
Page 94.
No. 30.
Ellangowan.
Name Jno. Gilbert.
Received of The Philadelphia & Reading Coal and Iron Co. $26.02 in full for Second Half Sep. 1914 wages.
(Sign here) JOHN GILBERT.

I certify that this Pay Voucher, with Statement attached, was given by me to the person authorized to receive it.
GWILYM W. JANES, *Foreman.*

NOTE.—On application at Colliery Office, detail of Supplies will be furnished.
THE PHILA. & READING COAL & IRON CO.

Audited Oct. 1, 1914. Paymaster's Office, Pottsville, Pa.

100 DEFENDANT'S EXHIBIT A.

Order to Show Cause Why Service of Summons and Complaint Should Not be Set Aside.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

Upon the summons and complaint herein and the attached affidavits of William H. MacEwan, verified the Ninth day of August, 1915, and William F. Purdy, verified August 11, 1915.

Let the plaintiff show cause at a Special Term of this Court for the hearing of motions to be held in and for the County of Westchester, in the Westchester County Court House at White Plains, New York, on the 3rd day of September, 1915, at the opening of Court on that day or as soon thereafter as counsel can be heard, why the service of the summons and complaint herein upon James Armstrong, should not be set aside on the ground that said service is in violation of the Constitution and Laws of the United States, particularly Section 1 of the 14th Amendment of the Constitution of the United States.

And it is further

101 Ordered, that the defendant's time to appear, answer or plead, demur or take such other steps as it may be advised herein be extended until ten days after the service of an order with notice of entry thereof, entered upon the decision brought on by this order to show cause.

Service hereof five days before the return day shall be sufficient, and if such service be made ten days before the return day, answering affidavits are to be served upon the defendant's attorneys five days before the said return day.

Dated, New York, August 13, 1915.

BARTOW S. WEEKS,
Justice of the Supreme Court
of the State of New York.

Affidavit of William H. MacEwan, Read in Support of Motion.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

William H. MacEwan, being duly sworn, deposes and says
102 that he is the assistant secretary of defendant herein and is well acquainted with defendant's properties and business.

1st. That the defendant was and now is a foreign corporation duly organized under and by virtue of the Laws of the State of Pennsylvania. The defendant does no business in the State of New York except as follows:

2nd. It maintains an office at No. 143 Liberty Street, in the Borough of Manhattan, City of New York, for the solicitation and receipt of orders for the sale of coal, which are forwarded to the defendant's main office in Philadelphia for approval, and said orders, if accepted, are filled from the State of Pennsylvania and the coal shipped to New York. Defendant also maintains depots and yards for the sale of coal in Buffalo, Rochester and Lyons, but conducts none of its mining operations in the State of New York.

3rd. Pursuant to the requirements of Section 16 of the General Corporation Law, the defendant has a duly designated agent upon whom process can be served; to wit: James Armstrong of No. 27 Cedar Street, Borough of Manhattan, City of New York, and said designation is now in force. Said designation was required to be filed by the Statutes of New York as a condition for the defendant doing business whatever in this State.

4th. The cause of action herein as appears by the complaint is not concerned in any wise with any business that the defendant transacts in the State of New York. The summons and complaint
103 herein were served upon said designated agent on the 26th day of July, 1915.

5th. Deponent is informed and believes that said service is void, in that the defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent, can only be implied with respect to causes of action arising in connection with business the defendant transacts in the State of New York; the plaintiff's cause of action herein did not arise in connection with the business defendant transacts in the State of New York but is brought to recover damages for personal injuries alleged to have been sustained in the State of Pennsylvania. An attempt to compel the defendant to respond to this suit in the Supreme Court of the State of New York, sitting in Westchester County, is an invasion of the defend-

ant's rights under the Constitution of the United States, particularly Section 1 of the 14th Amendment of the said Constitution.

6th. Defendant has fully and fairly stated the facts in this case to one of its counsel, William F. Purdy, who resides at # 186 82nd Street, Borough of Brooklyn, City of New York, and defendant has a good and substantial defense to this action upon the merits as advised by said counsel after such statement made as aforesaid.

7th. An order to show cause is asked for, for the reason that the defendant's time to appear, answer, plead, demur or take such other steps as it may be advised with respect to the complaint herein, may expire before the decision of this motion.

104 8th. No other application has been made for such an order to show cause and no extension of time to appear or plead has been granted by stipulation, order or otherwise.

9th. Defendant's time to appear, answer, demur, plead or take such other steps as it may be advised, will expire on the 15th day of August, 1915.

10th. Defendant herein appears specially for the sole purpose of contesting the validity of the alleged service of the summons and complaint herein.

WILLIAM H. MACEWAN.

Sworn to before me this 9th day of August, 1915.

[SEAL.] C. K. KLINK,
Notary Public.

My commission expires April 18, 1919.

In the Courts of Common Pleas of Philadelphia County.

(10c. stamp) C. C. P., Aug. 9, 1915—M. L. K.—

Affidavit (Notary).

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I, Henry F. Walton, Prothonotary of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the Laws of the State of Pennsylvania, to make the following certificate, do Certify, That C. K. Klink, Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature, as elsewhere; and that I am well acquainted with the handwriting of

105

the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this Court, this 9th day of August, in the year of our Lord One thousand nine hundred and fifteen (1915).

[SEAL.] HENRY F. WALTON,
Prothonotary.

106 *Affidavit of William F. Purdy, Read in Support of Motion.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

William F. Purdy, being duly sworn, deposes and says:

1st. That he resides at # 186—82nd Street, Borough of Brooklyn, City of New York.

2nd. That he is one of the defendant's attorneys in this action.

3rd. That defendant has fully and fairly stated the facts in this case to deponent who is one of its counsel, and the deponent, after such statement made to him as aforesaid, believes that said defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, this action being brought
107 to recover for personal injuries alleged to have been sustained by the plaintiff in the State of Pennsylvania.

4th. That defendant appears herein specially for the sole purpose of contesting the validity of the alleged service of the summons and complaint herein.

5th. That no other application has been made for this order to show cause and no extension of time to appear, answer, plead, demur or take such other steps as it may be advised has been granted by stipulation, order or otherwise.

6th. Defendant's time to appear and answer will expire on the 15th day of August, 1915.

Wherefore, deponent asks for the attached order to show cause, as defendant's time in which to appear and answer may expire before the decision of this motion.

WILLIAM F. PURDY.

Sworn to before me this 11th day of August, 1915.

T. D. ENGLISH,
Notary Public, Kings Co., # 8.

Cert. filed in N. Y. Co. # 9.

108 At a Special Term of the Supreme Court Held in and for the County of Westchester, in the County Court House in White Plains, New York, on the 15th Day of November, 1915.

Present—Honorable Joseph Morschauser, Justice.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

Upon the annexed consent and upon the affidavit of Thomas Dunn English, verified the 10th day of November, 1915, and upon motion of Armstrong, Brown & Purdy, attorneys for defendant appearing herein specially for the purpose of setting aside the service of the summons and complaint, it is

Ordered, that the order of this court, dated November 3, 1915, and filed in the office of the clerk of the County of Westchester on the same day be, and the same hereby is resettled so as to read as follows:

109 At a Special Term of the Supreme Court Held in and for the County of Westchester, in the County Court House in White Plains, New York, on the 3rd Day of November, 1915.

Present—Honorable Joseph Morschauser, Justice.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

A motion to set aside the service of the summons and complaint herein, made upon James Armstrong on the 26th day of July, 1915, upon the ground that said service is in violation of Section 1 of the 14th Amendment of the Constitution of the United States, coming on to be heard by an Order to Show Cause, in its regular order upon the motion calendar of this court on the 1st day of October, 1915, it is

Now upon reading and filing the summons and complaint, the order to show cause dated the 13th day of August, 1915; the affidavit of William H. MacEwan verified the 9th day of August, 1915; the affidavit of William F. Purdy verified the 11th day of August, 1915, in support of the motion; and after hearing Thomas Dunn English, of Counsel for the defendant, who appears herein specially for the purpose of this motion to set aside the service of the summons
110 and complaint and for that purpose only, in support of the motion, and Vine H. Smith, of counsel for the plaintiff in opposition thereto; and due deliberation having been had thereon,

Now upon motion of Stephen A. Machcinski, Esq., attorney for the plaintiff, it is

Ordered that said motion be and the same hereby is denied.

Enter:

J. M., *J. S. C.*

We hereby consent to the resettlement of the foregoing order. Dated, November 12, 1915.

STEPHEN A. MACHCINSKI,
Attorney for Plaintiff.

111 ARMSTRONG, BROWN & PURDY,
Attorneys for Defendant Appearing Specially for the Purpose of This Motion and for That Purpose Only.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas Dunn English, being duly sworn, deposes and says:

That he is an attorney-at-law and managing attorney for Messrs. Armstrong, Brown & Purdy, the attorneys for the defendant herein, who appears herein specially to move to set aside the service of the summons and complaint herein, and has had charge of the motion to set aside the service of the summons and complaint in this action.

That the order entered herein on the 3rd day of November, 1915, failed to recite the papers used upon the motion as required by Rule 3 of the General Rules of Practice. Said order fails to recite any of the affidavits used.

112 Wherefore, deponent asks that said order be resettled so as to recite all the affidavits used upon the said motion, to wit: Affidavit of William H. MacEwan verified the 9th day of August, 1915; the affidavit of William F. Purdy verified the 11th day of August, 1915, and the summons and complaint.

THOS. D. ENGLISH.

Sworn to before me this 11th day of November, 1915.

FLORENCE M. EPWORTH,
Notary Public, Kings Co., No. 13.

Certificate filed in N. Y. Co., No. 13.

DEFENDANT'S EXHIBIT B.

Motion to Dismiss.

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

SIR: Please take notice, that upon the trial of this action we shall move to dismiss the complaint herein upon the following grounds:

113 1st. That neither at the time of the commencement of this action, nor at any time since, was the plaintiff a bona fide resident of New York, but was, at such times and now is, in fact, a non-resident of this state.

2nd. That Section 1780 of the Code of Civil Procedure, in so far as it may require the Court to entertain jurisdiction of an action brought by a non-resident against a foreign corporation upon a cause of action not arising in this state, is unconstitutional.

3rd. That this Court has the right to decline to entertain jurisdiction of this cause as a matter of discretion, and that such discretion should be exercised against entertaining jurisdiction.

Dated, December 15, 1915.

ARMSTRONG, BROWN & PURDY,
Attorneys for Defendant.

Office & Post Office Address, 27 Cedar Street, Borough of Manhattan, New York City.

To Stephen A. Machcinski, Esq., 31 Nassau Street, New York City.

114 *Affidavit of No Opinion.*

COUNTY OF NEW YORK, *ss:*

Pierre M. Brown, being duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled action and that he tried the same before Mr. Justice Arthur S. Tompkins and a jury, and that said Justice, in deciding the defendant's motions to dismiss the complaint herein and for a new trial, rendered no written opinion.

PIERRE M. BROWN.

Sworn to before me this 15th day of May, 1916.

____ ____,
Notary Public, Kings County, No. 13.

Certificate filed in New York County, No. 60, and Westchester County.

Stipulation Settling Case.

It is hereby stipulated that the foregoing case contains all the evi
dence offered and given upon the trial of this action, and that th
same may be settled and annexed to the judgment roll herein.

Dated, White Plains, N. Y., May 15, 1916.

MACKLIN, BROWN & PURDY,
Attorneys for Defendant-Appellant.
STEPHEN A. MACHCINSKI,
Attorney for Plaintiff-Respondent.

115 *Order Settling Case.*

The foregoing case on appeal contains all the evidence offered an
given upon the trial of this action and is hereby settled and ordere
on file.

Dated, White Plains, N. Y., May 15, 1916.

ARTHUR S. TOMPKINS,
Justice of the Supreme Court.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it
hereby stipulated that the foregoing consists of true and corre
copies of the notice of appeal, judgment roll, motion to set aside th
service of the summons and complaint, motion to dismiss, case an
exceptions as settled and the whole thereof, now on file in the offi
of the Clerk of the County of Westchester, and certification there
by the Clerk of said County, pursuant to Section 1353 of the Co
of Civil Procedure is hereby waived.

Dated, White Plains, N. Y., May 15, 1916.

MACKLIN, BROWN & PURDY,
Attorneys for Defendant-Appellant.
STEPHEN A. MACHCINSKI,
Attorney for Plaintiff-Respondent.

116 *Order Filing Record in Appellate Division.*

Pursuant to Section 1353 of the Code of Civil Procedure, it
hereby

Ordered that the foregoing printed record be and the same hereb
is filed in the office of the Clerk of the Appellate Division of th
Supreme Court, for the Second Judicial Department.

Dated, White Plains, N. Y., May 15, 1916.

ARTHUR S. TOMPKINS,
Justice of the Supreme Court.

117 Supreme Court of the State of New York, Appellate Division, Second Department.

JOHN GILBERT, Plaintiff-Respondent,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant-Appellant.

SIR: Please take notice that the appeal in the above entitled matter will be brought on for argument before the Justices of this Honorable Court, at a Term thereof to be held in the Court rooms thereof, in the Borough Hall, in the Borough of Brooklyn, City of New York on the 4th Monday of September, 1916, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Dated New York, July 7th, 1916.

MACKLIN, BROWN & PURDY,
Attorneys for Defendant-Appellant.

Office and P. O. Address, 17 Battery Place, Borough of Manhattan, New York City.

To Stephen A. Machcinski, Esq., Attorney for plaintiff-respondent, 31 Nassau Street, New York City.

Endorsed: "Notice of Argument." Due and timely service of a copy of the within Notice of argument and notice hereon endorsed is hereby admitted. Dated New York, July 10, 1916. Stephen A. Machcinski, Attorney for plaintiff. e/z A-39909.

118 Due and timely service of 3 copies of the within record on appeal is hereby admitted.
Dated N. Y., July 17, 1916.

STEPHEN A. MACHCINSKI,
Attorney for Plaintiff-Respondent.

118½ At a Term of the Appellate Division of the Supreme Court Held in and for the Second Judicial Department at the Borough of Brooklyn on the 22nd Day of December, 1916.

Present: Hon. Edward B. Thomas,
" " William J. Carr,
" " Luke D. Stapleton,
" " Adelbert P. Rich,
" " Harrington Putnam,
Justices.

JOHN GILBERT, Respondent,

vs.

PHILADELPHIA & READING COAL & IRON COMPANY, Appellant.

Order of Affirmance on Appeal from Judgment.

The above named Philadelphia & Reading Coal & Iron Company, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a Judgment of the Supreme Court entered in the office of the Clerk of the County of Westchester, on the 18th day of March, 1916, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been argued by Mr. Pierre M. Brown, of Counsel for the appellant and by Mr. Vine H. Smith, of Counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby unanimously affirmed, and that the respondent recover of the appellant, the costs of this appeal.

Enter:

EDWARD B. THOMAS,
Acting Presiding Justice.

118¾ Supreme Court, Appellate Division, Second Judicial Department, Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action, and entered in my office on the 22nd day of December, 1916, and that the original case upon which said appeal was heard are hereto annexed.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court at the Borough of Brooklyn, this 22nd day of December, 1916.

[SEAL.] JOHN B. BYRNE, *Clerk.*

Filed Dec. 29, 1916.

119 Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL & IRON COMPANY, Defendant.

The above named defendant having appealed to the Appellate Division of the Supreme Court, Second Department from a judgment entered in favor of the above named plaintiff and against the defendant on or about the 18th day of March, 1916, in the office of the Clerk of the County of Westchester for the sum of $10,102.56, and also from an order entered in the office of the Clerk of this Court on or about the 15th day of March, 1916, denying the defendant's motion to set aside the verdict and to dismiss the complaint, and the said appeal having duly come on to be heard at a Term of the Appellate Division of the Supreme Court, Second Department, and the said Appellate Division having on December 22nd, 1916, unanimously affirmed said judgment, and order so appealed from in all things with costs, and plaintiff's costs having been taxed at the sum of $131.33,

Now on motion of Stephen A. Machcinski, attorney for the plaintiff, it is

Adjudged, that the judgment and order so appealed from be and the same hereby are in all things unanimously affirmed, and that the plaintiff recover of the defendant the sum of $131.33, his costs and disbursements as taxed, and that he have execution against said defendant for said amount.

Dated, December 29th, 1916.

DANIEL J. CASHIN, *Clerk.*

120 At a Term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 26th day of January, 1917.

Present: Hon. Almet F. Jenks, Presiding Justice.
" " Edward B. Thomas,
" " Isaac N. Mills,
" " Adelbert P. Rich,
" " Harrington Putnam,
Justices.

JOHN GILBERT, Respondent,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Appellant.

Order on Motion for Leave to Appeal to the Court of Appeals.

The above named Philadelphia & Reading Coal and Iron Company, the defendant, having moved this Court for Leave to Appeal

to the Court of Appeals, and the motion having duly come on to be heard and the briefs of the respective parties in support thereof and in opposition thereto having been duly filed;

Now on reading and filing the papers upon which said motion is based and the opposing papers, and upon considering the said papers and all the papers upon which the appeal was heard;

On motion of Mr. Stephen A. Machcinski, of Counsel for the Respondent,

It is ordered that the said motion be and the same is hereby denied without costs.

Enter.

ALMET F. JENKS,
Presiding Justice

121 Supreme Court, Appellate Division, Second Judicial Department, Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court, in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action and entered in my office on the 26th day of January, 1917.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at the Borough of Brooklyn, this 15th day of February, 1917.

[SEAL.] JOHN B. BYRNE, *Clerk.*

Filed Feb. 17, 1917.

122 Court of Appeals.

JOHN GILBERT, Respondent,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Appellant.

After consideration of this case, I find no sufficient reason for allowing an appeal to the Court of Appeals, and the application for that relief is therefore denied.

BENJAMIN N. CARDOZO,
Judge of the Court of Appeals.

New York, February 3, 1917.

123 *Affidavit of No Opinion.*

Supreme Court, Westchester County.

JOHN GILBERT, Plaintiff,

against

PHILADELPHIA & READING COAL AND IRON COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Thomas Dunn English, being duly sworn, deposes and says that he is an attorney-at-law and managing attorney for Macklin, Brown & Purdy, attorneys for the defendant herein.

That upon the above appeal herein to the Appellate Division of the Supreme Court held in and for the Second Judicial Department, said Justices rendered no written opinion in deciding said appeal, and that upon the application made to the said court for leave to appeal to the Court of Appeals herein, the Justices of said court rendered no written opinion in denying the same.

That upon the application to the Honorable Benjamin N. Cordoza, Judge of the Court of Appeals, for leave to appeal to the Court of Appeals of the State of New York, in said court, said Justice rendered no written opinion.

THOS. D. ENGLISH.

Sworn to before me this 3rd day of March, 1917.

[Seal Frederick Bouchard, Notary Public, Kings County, N. Y.]

FREDERICK BOUCHARD,
Notary Public.

Notary Public, Kings County.
Certificate filed New York Co., No. 522.

124 Supreme Court of the United States.

PHILADELPHIA & READING COAL AND IRON COMPANY, Plaintiff in Error,

against

JOHN GILBERT, Defendant in Error.

Know all men by these presents, That we, the Philadelphia & Reading Coal and Iron Company, principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at #47 Cedar Street, New York City, surety, are

held and firmly bound unto John Gilbert, in the sum of Fourteen thousand ($14,000.00) dollars, lawful money of the United States of America, to be paid to the said John Gilbert for the payment of which well and truly to be made, we bind ourselves and each of our successors, assigns and representatives, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 8th day of February, 1917.

Whereas the said Philadelphia & Reading Coal and Iron Company has applied or is about to apply for a writ of error to the Supreme Court of the United States to reverse the judgment dated the 18th day of March, 1916 and the judgment of affirmance dated the 29th day of December, 1916 rendered in the above entitled suit of the Supreme Court of the State of New York, County of Westchester.

Now, therefore, the condition of this obligation is such that if the above named Philadelphia & Reading Coal and Iron Com-
125 pany shall prosecute its writ of error to effect and answer all damages and costs and if it shall fail to make its said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

PHILADELPHIA & READING COAL AND IRON CO.,
By W. G. BROWN, *Vice President.*

Attest:
W. H. MACEWAN,
Assistant Secretary.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney in Fact.

Attest:
WILLIAM H. ESTWICK,
Attorney in Fact.

[Endorsed copy received Feb. 13, 1917. Stephen A. Machcinski, attorney for John Gilbert.]

Endorsed.

The within undertaking is approved as to form and as to the sufficiency of the surety.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

United States Fidelity and Guaranty Co., 47 Cedar Street, New York City, Surety.

126 *Affidavit, Acknowledgement and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, know- to me to be an Attorney-in-fact, of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Philadelphia & Reading Coal and Iron Company, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Philadelphia & Reading Coal and Iron Company, is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact, of said Company; and that he is acquainted with William H. Estwick, and knows him to be Attorney-in-fact of said Company, and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Two million dollars ($2,000,000.00).

S. FRANK HEDGES.

127 Sworn to, acknowledged before me, and subscribed in my presence, this 8th day of February, 1917.

C. D. MARSAC,
Notary Public,
New York County No. 47, *Register's No.* 7086.

Certificates filed in Kings No. 6, Register's No. 7005; Bronx No. 6, Register's No. 712; Queens, Richmond, Westchester, Nassau, Rockland, Putnam, Orange and Suffolk Counties.
Term expires Mar. 30, 1917.

128 Supreme Court of the United States.

PHILADELPHIA & READING COAL AND IRON COMPANY, Plaintiff in Error,

against

JOHN GILBERT, Defendant in Error.

Know all men by these presents, That the United States Fidelity and Guaranty Company, organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 47 Cedar Street, New York City, is held and firmly bound unto the above named John Gilbert, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said John Gilbert, his heirs, administrators, or assigns, to which payment well and truly to be made the said United States Fidelity and Guaranty Company binds itself, its successors and assigns firmly by these presents.

Signed and sealed with the Corporate seal this 8th day of February, 1917.

Whereas, the above named Philadelphia & Reading Coal and Iron Company has prosecuted a Writ of Error to the United States Supreme Court to reverse a certain judgment rendered in the above entitled action by the Appellate Division of the Supreme Court of said State, Second Department.

Now, therefore, the condition of the above obligation is such that if the said Philadelphia & Reading Coal and Iron Company shall prosecute its writ of error to effect, and answer all costs if it fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney in Fact.

Attest:
WILLIAM H. ESTWICK,
Attorney in Fact.

129 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, know- to me to be an Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Philadelphia & Reading Coal and Iron Company, as surety thereon, who being by me duly sworn, deposes and says that he re-

sides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Philadelphia & Reading Coal and Iron Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my
130 presence this 8th day of February, 1917.

C. D. MARSAC,
Notary Public, New York County, No. 47,
Register's No. 7085.

Certificates filed in Kings County No. 8. Register's No. 7065, Bronx No. 4. Register's No. 712, Queens, Richmond, Westchester, Nassau, Rockland, Putnam, Orange, and Suffolk Counties.
Term Expires Mar. 30, 1917.

[Endorsed: Copy received Feb. 13, 1917. Stephen A. Machcinski, attorney for John Gilbert.]

Endorsed.

The within undertaking is approved as to form and as to the sufficiency of the surety.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

United States Fidelity and Guaranty Co., 47 Cedar Street, New York City, Surety.

Filed Feb. 17, 1917. Daniel J. Cashin, Clerk.

131 Supreme Court of the United States.

PHILADELPHIA & READING COAL AND IRON COMPANY, Plaintiff-in-Error,

against

JOHN GILBERT, Defendant-in-Error.

To the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States:

The petition of the Philadelphia & Reading Coal and Iron Company, respectfully shows:

That on the 26th day of July, 1915, the defendant-in-error served a summons and complaint in an action at law, upon James Armstrong, the person designated pursuant to Section 16 of the General Corporation Law to accept service of process for the plaintiff-in-error in the State of New York for the recovery of damages claimed to have been sustained by the plaintiff as the result of personal injuries received by him in a colliery owned by the defendant in the State of Pennsylvania.

The defendant appear- specially and made a motion to set aside the service of said summons and complaint, claiming that said service was void and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, the facts being as follows:

Defendant was and is a foreign corporation organized under the laws of the State of Pennsylvania and transacting no business in the State of New York, except that it maintains an office at #143 Liberty Street, in the Borough of Manhattan, City of New York, for the solicitation and receipt of orders for the sale of coal which are forwarded to defendant's main office in Philadelphia for ap-
132 proval and said orders, if accepted, are filled from the State of Pennsylvania and the coal shipped to New York, and defendant also maintains depots and yards for the sale of coal in Buffalo, Rochester and Lyons, but conducts none of its mining operations in the State of New York. That pursuant to the requirements of Section 16 of the General Corporation Laws of the State of New York, defendant has a duly designated agent upon whom process can be served, to wit: James Armstrong, 27 Cedar Street, Borough of Manhattan, City of New York. That said designation was in force at the time the attempted service was made herein, and still is in force. That said designation was required to be filed by the Statutes of the State of New York as a condition for the defendant doing any business whatever in the State of New York.

The cause of action herein did not arise out of any business transacted by the defendant in the State of New York, but is brought to recover damages for personal injuries claimed to have been sustained in the State of Pennsylvania. That defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent can only be implied with respect to causes of action arising in

connection with the business defendant transacts in the State of New York.

That defendant's said motion to set aside the service of the summons and complaint was denied, and defendant required to answer, reserving to itself the objection to the jurisdiction of the Supreme Court of the State of New York, sitting in the County of Westchester, over the person of the defendant in this case and over the cause of action, and answering under protest the complaint herein pleaded the aforesaid facts, and that the same was an invasion of the
133 defendant's constitutional rights and was an act depriving or attempting to deprive the defendant of its property without due process of law and that said service was in violation of Section 1 of the 14th Amendment of the Constitution of the United States. The cause proceeded to trial wherein said objection was further raised and on the 18th day of March, 1916, a judgment of the Supreme Court, State of New York, was entered in the office of the Clerk of the County of Westchester in said State in the sum of Ten thousand, one hundred and two and 56/100 ($10,102.56) dollars, and an appeal was taken from said judgment to the Appellate Division of the Supreme Court, Second Judicial Department, and that court unanimously affirmed said judgment together with $131.58, costs, and that a judgment was entered thereon on the 29th day of December, 1916. An application was made, subsequently thereto, to said Appellate Division and to a Judge of the Court of Appeals for leave to appeal to the Court of Appeals of the State of New York, and both of said applications were denied.

In as much as certain errors appear in the judgment entered upon the order of affirmance of the Appellate Division, Second Judicial Department and in the proceedings had prior thereto as recited in the annexed assignment of errors, the plaintiff-in-error prays for an allowance of a writ of error, returnable in the Supreme Court of the United States and a citation, and that a transcript of the record, proceedings and papers upon which said judgments were rendered, duly authenticated, be sent to the Supreme Court of the United States at Washington, D. C., under the rules of the said court and such cases made and provided and that the same may be by this Honor-
134 able court inspected and corrected in accordance with law and justice.

Dated, February 8*nd*, 1917.

PHILADELPHIA & READING COAL AND IRON COMPANY,
By PIERRE M. BROWN, *Attorney.*

[Endorsed: Copy received Feb. 13, 1917. Stephen A. Machcinski, Attorney for John Gilbert. Filed Feb. 17, 1917. Daniel J Cashin, Clerk.]

135 Supreme Court of the United States.

PHILADELPHIA & READING COAL AND IRON COMPANY, Plaintiff in Error,

against

JOHN GILBERT, Defendant in Error.

UNITED STATES OF AMERICA:

And now comes the Philadelphia & Reading Coal and Iron Company, the plaintiff-in-error in the above entitled cause, and in connection with its application for a writ of error makes its assignment of errors:

1st. The court erred in deciding that the service of the summons and complaint upon James Armstrong on or about the 26th day of July, 1915 was not void under Section 1 of the 14th Amendment of the Constitution of the United States and was not an act depriving or attempting to deprive the defendant of its property without due process of law, and thereby attempted to deprive the plaintiff-in-error, the Philadelphia & Reading Coal and Iron Company of its property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States, and the acts of Congress enacted pursuant thereto.

2nd. That the court erred in not admitting in defense the order denying the defendant-in-error's motion to set aside the service of the summons and complaint upon James Armstrong made on the 26th day of July, 1915 and the papers upon which said order was entered.

3rd. That the court erred in not rendering judgment in
136 favor of the plaintiff-in-error and in not dismissing said proceedings and in not setting aside the service of said summons and complaint and that the decision in favor of the validity of the service of said summons and complaint which decision was in direct violation of and contrary to the provisions of Section 1 of the 14th Amendment of the Constitution and laws of the United States and the acts of Congress enacted pursuant thereto.

Dated, New York, February 9th, 1917.

PIERRE N. BROWN,
Attorney for Plaintiff-in-Error.

[Endorsed copy received Feb. 13, 1917. Stephen A. Machcinski, attorney for John Gilbert. Filed Feb. 17, 1917. Daniel J. Cashin, clerk.]

137 Supreme Court of the United States.

PHILADELPHIA & READING COAL AND IRON COMPANY, Plaintiff in Error,

against

JOHN GILBERT, Defendant in Error.

To the Honorable the Supreme Court of the United States:

And now comes the above named plaintiff-in-error and in connection with its writ of error issued by this court to the Supreme Court of the State of New York, Westchester County, it prays for a reversal of the judgment against it entered in the office of the Clerk of the County of Westchester on the 18th day of March, 1916 in an action brought by the defendant-in-error against the plaintiff-in-error in said court and also prays for a reversal of the judgment of affirmance entered in the office of said Clerk on the 29th day of December, 1916 upon the order of affirmance of the Appellate Division, of the Supreme Court, Second Judicial Department entered in the office thereof on the 22nd day of December, 1916.

PIERRE N. BROWN,
Attorney for Plaintiff in Error.

[Endorsed copy received Feb. 13, 1917. Stephen A. Machcinski, attorney for John Gilbert. Filed Feb. 17, 1917. Daniel J. Cashin, clerk.]

138 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Gilbert, plaintiff, and Philadelphia & Reading Coal and Iron Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity, especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Philadelphia & Reading

Coal & Iron Company, as by its complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
139 the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of February, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the
Supreme Court of the United States.

[Endorsed copy received Feb. 13, 1917. Stephen A. Macheinski, attorney for John Gilbert.]

140 UNITED STATES OF AMERICA, *ss:*

To John Gilbert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of New York, wherein the Philadelphia & Reading Coal and Iron Company is Plaintiff-in-error and you are defendant-in-error to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis Associate Justice of the Supreme Court of the United States on the 10th day of February, 1917.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court
of the United States.

On this 16th day of February, in the year of our Lord one thousand nine hundred and seventeen, personally appeared Thos. D. English, before me, the subscriber, a Notary Public of the State of

New York, County of New, duly commissioned and sworn and makes oath that he delivered a true copy of the within citation to John Gilbert, the defendant-in-error at the office of Stephen A. Machcinski, No. 31 Nassau Street, Borough of Manhattan, New York City.

THOS. D. ENGLISH,

Sworn to and subscribed the 16th day of February, A. D. 1917.

[SEAL.] FREDERICK BOUCHARD,
Notary Public, Kings County.

Certificate filed New York County No. 522.

Copy Received February 13" 1917. Stephen A. Machcinski, Attorney for John Gilbert, Defendant in Error.

141 STATE OF NEW YORK,
County of Westchester, ss:

I, Daniel J. Cashin, Clerk of the County of Westchester and the courts of record thereof, pursuant to a writ of error directed to the Honorable Judges of the Supreme Court of the State of New York which said writ was allowed by the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States signed by the Clerk of said court on the 10th day of February, 1917, do hereby certify the writing thereto attached to be a true complete and perfect copy of the record, assignment of erro-s, and all proceedings in the case of John Gilbert, Plaintiff-respondent against the Philadelphia & Reading Coal and Iron Company, Defendant-appellant as fully as the same remain on file and on record in said case in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said county and said court this 2" day of March, 1917.

[Seal Westchester County.]

DANIEL J. CASHIN,
Clerk of the County of Westchester,
State of New York.

142 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Gilbert, plaintiff, and Philadelphia & Reading Coal & Iron Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United

States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution,
143 or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Philadelphia & Reading Coal & Iron Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of February, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by—
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1916. Philadelphia & Reading Coal & Iron Company vs. John Gilbert. Writ of Error. (Copy in record.) Copy Received February 13th, 1917. Stephen A. Macheinski, Attorney for John Gilbert, Defendant in Error.

144 UNITED STATES OF AMERICA, *ss:*

To John Gilbert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Philadelphia & Reading Coal & Iron Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error

as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this tenth day of February, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

145 On this 16th day of February, in the year of our Lord one thousand nine hundred and seventeen, personally appeared Thos. D. English before me, the subscriber, a Notary Public of the State of New York, County of New York, duly Commissioned and sworn and makes oath that he delivered a true copy of the within citation to John Gilbert the defendant-in-error at the office of Stephen A. Machcinski, #31 Nassau Street, Borough of Manhattan, New York City.

THOS. D. ENGLISH.

Sworn to and subscribed the 16th day of February, A. D. 1917.

[Seal Frederick Bouchard, Notary Public, Kings County.]

FREDERICK BOUCHARD,
Notary Public, Kings County.

Certificate Filed New York Co. No. 522.

[Endorsed:] Copy Received February 13", 1917. Stephen A. Machcinski, Attorney for John Gilbert, Defendant in Error. (Copy in record.)

Endorsed on cover: File No. 25,857. New York Supreme Court. Term No. 1027. Philadelphia & Reading Coal & Iron Company, plaintiff in error, vs. John Gilbert. Filed March 27th, 1917. File No. 25,857.

10

Office Supreme Court, U. S.
FILED
APR 24 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM 1916—No. [redacted] 454

PHILADELPHIA & READING COAL & IRON CO.,
Plaintiff in Error,

against

JOHN GILBERT,
Defendant in Error.

MOTION TO DISMISS OR AFFIRM OR TO PLACE CAUSE ON SUMMARY DOCKET AND BRIEF IN SUPPORT THEREOF.

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for Defendant in Error,
Office & P. O. Address,
120 Broadway,
New York City.

Supreme Court of the United States

PHILADELPHIA & READING COAL & IRON CO., *Plaintiff in Error,*	No. 1027.
against	Motion to Dismiss or Affirm.
JOHN GILBERT, *Defendant in Error.*	

Comes now defendant in error and moves this Honorable Court (1) to dismiss the writ of error herein upon the ground that this court is without jurisdiction or color of jurisdiction thereof, for the reason that no Federal or other question entitling this court to revise the judgment of the court below is presented here for review.

(2) If the motion to dismiss be denied, defendant in error moves to affirm the judgment of the court below upon the ground that the only Federal right ever asserted herein by the plaintiff in error is one personal to the plaintiff in error which it could and did in fact waive, by answering to the merits of the cause of action against it and by participating in the trial of the action upon the merits thereof as more fully disclosed by the record herein.

(3) If both said motions be denied, defendant in error moves that the cause be transferred to the summary docket for prompt hearing upon the ground that the cause is of such a character as not to require extended argument.

Dated, April 20th, 1917.

Respectfully submitted,
SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorney for Defendant in Error.

SIR:

PLEASE TAKE NOTICE that the foregoing motion will be submitted to the court at the City of Washington in the District of Columbia on the 11 day of May, 1917 at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated, April 20th, 1917.

Yours truly,
SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for the Defendant, in Error,
Office & P. O. Address,
120 Broadway,
New York City.

To
PIERRE M. BROWN, ESQ.,
Attorney for Plaintiff in Error,
17 Battery Place,
New York City.

SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA & READING COAL & IRON CO.,
Plaintiff in Error,

against

JOHN GILBERT,
Defendant in Error.

Brief of the Defendant in Error in Support of Motion.

Statement.

This is a motion to dismiss or affirm, or in the alternative to transfer the cause for hearing to the summary docket of the court.

The motion to dismiss is based upon the ground that no Federal question is presented for review.

The motion to affirm rests upon the ground that the only Federal right asserted is a mere personal privilege which the plaintiff in error could and did waive.

The case is of such a character as not to justify extended argument and for that reason if the motion to dismiss or affirm is denied, the cause should be transferred to the summary docket for prompt hearing.

The case is here upon writ of error to review a judgment of the Appellate Division of the Supreme Court of the State of New York in the Second Department (R. 65) (that court being the court of last resort having jurisdiction to determine the case) which affirmed a judgment of $10,102.56 (R. 13) rendered in favor of the defendant in error after a trial before the court and jury in a personal injury suit.

The defendant here was the plaintiff below and when he commenced this action he was a resident of the State of New York (R. 5, 22, 43, 48).

While in the employ of the plaintiff in error at its mines in Pennsylvania, he sustained injuries which resulted from its negligence (R. 5, 6).

The plaintiff in error was and is a Pennsylvania corporation, but when the action was commenced it was actually doing and was authorized to do business within the State of New York (R. 8, 9).

It had an office in New York City, maintained depots and yards for the sale of coal in Buffalo, Rochester and Lyons and had voluntarily designated an agent within the State of New York to receive service of process in its behalf pursuant to the General Corporation Law of the State (R. 9, Answer paragraphs 17 and 18).

The action was commenced by the service of process within the State of New York upon the agent of the plaintiff in error so designated by it (R. 9, Answer Paragraph 19).

Shortly after the service of the summons and complaint upon its designated agent plaintiff in error, appearing specially and solely for that purpose, moved to set aside the service of the summons and complaint (R. 55-61), upon the ground "that the defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent, *can only be implied with respect to causes of action arising in connection with business the defendant transacts in the State of New York;* the plaintiff's cause of action herein did not arise in connection with the business the defendant transacts in the State of New York, but is brought to recover damages for personal injuries alleged to have been sustained in the State of Pennsylvania. An attempt to compel the defendant to re-

spond to this suit in the Supreme Court of the State of New York, sitting in Westchester County, is an invasion of the defendant's rights under the Constitution of the United States, particularly Section 1 of the 14th amendment of the said Constitution" (R. 56).

The motion was overruled (R. 60) and thereafter although protesting that it reserved its alleged objection to the jurisdiction of the court, the plaintiff in error appeared generally by answer (R. 7), and pleaded to the merits of the cause of action against it and participated in the trial of the case before the court and jury (R. 14-49) by cross-examining the witnesses of the plaintiff below (R. 20-26), by offering evidence in its own behalf (31-41) by moving to dismiss at the close of the case upon non-jurisdictional grounds (R. 30, 43) and finally by moving to set aside the verdict which had been rendered against it and for a new trial upon the alleged grounds that the verdict was contrary to the law, contrary to the evidence, against the weight of evidence, and upon all the grounds set forth in Section 999 of the New York Code of Civil Procedure, none of which were of a jurisdictional or Federal character (R. 49).

All of these motions were overruled (R. 12, 13), and the plaintiff in error prosecuted its appeal to the Appellate Division of the Supreme Court of the Second Department (R. 2) and the cause was there heard and without opinion (R. 67) determined adversely to the plaintiff in error.

But neither the judgment of the trial court, nor its affirmance below, rested upon the denial of any Federal right asserted by the plaintiff in error.

The judgment rested upon rules of general jurisprudence broad enough in themselves to sustain it without considering any Federal question.

The only question involved in this connection was

the liability of a foreign corporation actually doing business within the State and which had voluntarily designated an agent within the State to receive process in its behalf to be sued in the courts of the State of New York upon a transitory cause of action which arose elsewhere.

But this inquiry depended not upon any provision of the Federal constitution, but upon the interpretation of the provision of the General Corporation Law of the State of New York pursuant to which the designation was filed and upon the extent and scope of the consent of the foreign corporation to be sued in New York, which consent is necessarily implied from the designation of an agent to receive the service of process in its behalf.

Thus, nothing more was involved than the construction and interpretation of a state statute and of a voluntary act upon the part of the plaintiff in error which in reality, as will presently be shown, constituted a contract between it and the state.

After exhausting its efforts to secure a review of the judgment of affirmance in the Court of Appeals of the State of New York (R. 66), plaintiff sued out this writ, predicating this court's jurisdiction solely upon the claim that the judgment rendered below deprives plaintiff in error of its property without due process in violation of Section 1 of the 14th Amendment of the Constitution (R. 73).

But the foregoing statement shows that there is no Federal question in the case, in consequence of which the writ of error should be dismissed.

Even if the cause originally presented a Federal question the Federal right asserted by the plaintiff in error is a privilege personal to it and might be and was in reality waived by the plaintiff in error.

Certainly, the case is of such a character as not to

justify extended argument and if not dismissed or affirmed it should be transferred for hearing to the summary docket.

POINT I.

The record presents no Federal question for review in consequence of which the writ of error should be dismissed.

The real question presented by the plaintiff in error is its contention "that the defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent *can only be implied with respect to causes of action arising in connection with the business the defendant transacts in the State of New York*" (R. 56).

In other words, its designation of an agent within the State of New York to receive service of process in its behalf pursuant to the General Corporation Law of that State was limited to a consent on its part to be sued within the State of New York only upon causes of action arising therein and since the cause of action herein involved resulted from personal injuries sustained in Pennsylvania, it may not without its express consent and without violating the rights assured to it under the 14th Amendment, be sued thereon in the courts of the State of New York.

But the assertion (1) is erroneous and (2) moreover involves no Federal right of any kind.

(1) It is now settled that where a foreign corporation is doing business in a state other than the state of its origin and is there represented by a designated officer, he is its agent to accept service, though the cause of action has no relation to the business there transacted and arose in another state.

Barrow S. S. Co. v. *Kane,* 170 U. S. 100, 105, 112;

Bagdon v. *Phila. & Reading C. & I. Co.,* 217 N. Y. 432, 438;

Johnston v. *Trade Ins. Co.,* 132 U. S. 432;

Wilson v. *Martin-Wilson Fire Alarm Co.,* 149 Mass. 24, 27;

Reeves v. *Southern Ry. Co.,* 121 Ga. 561, 563;

Hawkins v. *Fidelity & Casualty Co.,* 123 Ga. 722;

The Robert Dollar Co. v. *Canadian Car & Foundry Co.,* (N. Y. Ct. of Appeals, decided March 7, 1917; reported N. Y. Law Journal March 23, 1917, 220 N.Y. 270

The court of last resort in the State of New York have as a matter of local law decided that the voluntary designation of an agent to receive process within the State of New York in behalf of a foreign corporation, authorized litigants to sue that corporation in New York upon any action which under the Laws of New York may be brought there against such foreign corporation (Bagdon v. Phila. & Reading C. & I. Co., 217 N. Y., 432, 438).

The causes of action upon which a foreign corporation is liable to be sued in New York are specified in Section 1780 of the New York Code of Civil Procedure which is as follows:

> "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> 1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this State."

The method of serving process in the State of New York upon foreign corporations is regulated by Section 432 of N. Y. Code of Civil Procedure which is in part as follows:

"Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof within the state as follows: * * * * * 2. To a person designated for the purpose as provided in Section 16 of the General Corporation Law * * * * * *."

As we view the case the construction of the statute quoted is not here involved.

The Court of Appeals of the State of New York on March 6, 1917, in the case of the Robert Dollar Co. v. Canadian Car and Foundry Co. (N. Y. Law Journal, March 23, 1917) held that Section 432 of the Code of Civil Procedure while unconstitutional so far as it imports a right thus to acquire jurisdiction of corporations not doing business in this State, is a valid enactment with respect to corporations doing business here.

The construction thus placed upon this statute by the court of last resort of the State of New York, as well as the construction placed by the same court in the Bagdon case, supra, upon Section 16 of the General Corporation Law of the State are binding upon this Court.

But the facts set out in the answer established that

the plaintiff in error was doing business in this State and its answer clearly estops it to deny that fact (R. 9).

Washington & Va. Ry. v. *Real Estate Tr. Co.*, 238 U. S. 185, 186;
St. L. S. W. Ry. Co. v. *Alexander*, 227 U. S., 218, 223;
International Harvester Co. v. *Commonwealth of Kentucky*, 234 U. S. 579, 585, 589.

It is not important that the plaintiff in error claims that the defendant in error was not a resident of New York when suit was commenced. The record shows that he was a resident (R. 5, 22, 43, 48), but since jurisdiction over the plaintiff in error depends upon the doing of business by it within the State and upon the designation of its agent to receive process in its behalf, it is immaterial where plaintiff below resided when suit was commenced.

The admissions contained in the answer of the defendant below were alone sufficient to require the courts below to decide, as they did, as a matter of fact that the defendant below was doing business in New York when served with process, and hence under all of the authorities was amenable to suit in that State.

This finding having adequate support in the record is binding here.

Interstate Amusement Co. v. *Albert*, 239 U. S. 560, 566, 567.

But if this were not so this Court could reach no other conclusion from the record.

(2) The decision of the courts below that the plaintiff in error was properly sued in the New York courts did not necessarily or actually involve the denial to the plaintiff in error of any Federal right.

The state courts did not pass upon the Federal right asserted and did not either actually or in effect deny to the plaintiff in error any Federal right, privilege or immunity.

The case was decided in the courts below upon rules of general jurisprudence broad enough in themselves to sustain them without considering any Fedral question and no Federal question was passed upon by either of the courts below.

The finding by the courts below that the plaintiff in error was doing business in the State of New York, and the decision that the consent to be sued in New York extended to transitory actions arising outside of the State, as well as to actions arising within it, amply supports the judgment without considering any Federal question.

It is well settled that it must appear in the record that the Federal right was presented, distinctly ruled upon and denied.

Fowler v. *Lamson*, 164 U. S. 252, 255;
Western Union Tel. Co. v. *Wilson*, 213 U. S. 52, 53;
Eustis v. *Boles*, 150 U. S. 361, 366;
Powell v. *Brunswick County*, 150 U. S. 433, 439, 440;
Harrison v. *Morton*, 171 U. S. 38, 47.

And even though the Federal question was raised it must also appear that the decision was not or could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the Federal question.

Eustis v. *Boles*, 150 U. S. 361, 366;
Conn. ex rel., etc. v. *Woodruff*, 153 U. S. 689, 691;
Rogers v. *Jones*, 214 U. S. 196, 204.

Even if the courts below had erroneously decided the question upon adequate evidence, still no Federal question would be presented for review.

But the courts decided the question correctly and in accord with the authorities already cited.

This was not the decision of a Federal question. It was merely a matter of interpreting a state statute, namely, Section 16 of the General Corporation Law and deciding the legal effect of the act and conduct of the plaintiff in error in voluntarily designating an agent in New York to receive process in its behalf.

When plaintiff in error voluntarily designated its agent to receive process for it in New York, it entered into a contract with the State whereby the State in return for this designation, extended the privilege to the plaintiff in error to transact its business here and to enforce its contracts when desired in its courts.

Bagdon v. *Phila. & Reading C. & I. Co., supra.*

The mere interpretation of such a contract against the claim of the plaintiff in error involves no denial of any Federal right, privilege or immunity and presents no Federal question for review.

Pa. Fire Ins. Co. v. *The Gold Issue Mining & Milling Co.*, 243 U. S.

As Mr. Justice Holmes said in this case:

> The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in

terms to receive service in such cases, there would be equally little doubt. *New York, Lake Erie & Western R. R. Co.* v. *Estill*, 147 U. S. 591. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. *O'Neill* vs. *Northern Colorado Irrigation Co.*, 242 U. S. 20, 26. Other state laws have been construed in a similar way; *e. g. Bagdon* vs. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432; *Johnston* v. *Trade Insurance Co.*, 132 Mass. 432.

The defendant relies upon *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern Ry. Co.*, 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the Court below, quoting a brief and pointed statement in *Smolik* v. *Philadelphia & Reading Iron & Coal Co.*, 222 Fed. Rep. 148; a statement reinforced by Cardozo, J., in *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain States without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other States. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by Learned Hand, J., in 222 Fed. Rep. 148, 152, this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Insurance Co.* v. *French*, 18 How. 404.

Michigan Trust Co. v. *Ferry*, 228 U. S. 346, 353. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. *The Eliza Lines*, 199 U. S. 119, 130, 131."

Thus it appears that regardless of any Federal question the decision of the courts below was correct, in consequence of which this Court is without jurisdiction in the premises.

Hammond v. *Johnston*, 142 U. S. 73, 78.

It follows that the motion to dismiss should be granted.

POINT II.

If the motion to dismiss is denied the motion to affirm should be granted, for it appears that the only Federal right claimed to have been denied to the plaintiff in error is a mere personal privilege which plaintiff might and did waive.

Notwithstanding the protestations of the plaintiff in error that it did not waive its objection to being sued in the courts of New York, it is obvious that it could and did waive the privilege in this respect.

If the right not to be sued in New York existed, it was merely a personal privilege which might lawfully be waived by the plaintiff in error.

Matter of Moore, 209 U. S. 490, 496;
Western Loan Co. v. *Butte & Boston M. Co.*, 210 U. S. 368, 371.

The plaintiff in error did waive the privilege by its general appearance and by answering and by participating in the trial of the merits of the action.

Western Loan Co. v. *Butte & Boston M. Co. supra;*
Interior Construction & Imp. Co. v. *Gibney,* 160 U. S. 217, 220;
In re Keasbury & Mattison Co. id. 221, 229;
Exparte Schollenberger, 96 id. 369, 376;
Central Tr. Co. vs. *McGeorge,* 151 id. 129, 132;
N. Y. Code of Civil Procedure, sec. 421, 424;
Reed v. *Chilson,* 142 N. Y. 152, 155.

The motion to affirm should, therefore, be granted.

POINT III.

If neither motion be granted we ask that the cause be transferred for hearing to the summary docket of the Court upon the ground already stated.

Respectfully submitted,

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for Defendant in Error.

April 20, 1917.

Supreme Court of the United States.

PHILADELPHIA & READING COAL & IRON CO.,
Plaintiff-in-Error,

against

JOHN GILBERT,
Defendant-in-Error.

Supplemental Memorandum in Behalf of Defendant-in-Error in Support of Motion to Dismiss or Affirm.

The right of review in this Court is based upon the claim that a judgment against the plaintiff-in-error rendered in the Supreme Court of the State of New York is not due process within the meaning of the 14th Amendment of the Federal Constitution.

The plaintiff-in-error is a Pennsylvania corporation authorized to do, and actually doing, business within the State of New York.

Through the negligence of the plaintiff-in-error the defendant-in-error sustained injuries while in its employ in the State of Pennsylvania.

This action was brought to recover damages for the injuries so sustained.

Although the plaintiff-in-error had voluntarily designated its own agent to receive the service of

process in its behalf within the State of New York, and notwithstanding the service of process upon this agent in this suit, the plaintiff-in-error claims that the resulting judgment against it is not due process within the 14th Amendment of the Federal Constitution.

On February 10th, 1917, a writ of error issued out of this Court (R., 76) to review a final judgment of affirmance entered on December 29th, 1916 (R., 65, 73), in the highest Court of the State of New York in which a decision in this suit could be had (R., 65).

The act entitled "An Act to Amend the Judicial Code, etc.," approved September 6th, 1916, Chapter 448, Section 2, amends Section 237 of the Judicial Code.

The amendment became effective October 6th, 1916.

This section, as so amended, is in part as follows:

> "Section 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme

Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

The obvious purpose and effect of this amendment is to render judgments such as the one sought to be reviewed in the case at bar, subject to review in this Court *only* upon certiorari.

Such judgments, assuming, without conceding, that they present any Federal question for review in this Court, may not any longer be reviewed by writ of error as a matter of right.

It necessarily follows that this Court is now without jurisdiction to review the judgment below upon this writ of error.

These considerations, as well as those to which attention has already been directed, require the dismissal of the writ of error.

Dated May 21st, 1917.

Respectfully submitted,

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for Defendant-in-Error.

Office Supreme Court, U. S.
FILED
OCT 26 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October Term, 1917—No. 454.

PHILADELPHIA & READING COAL & IRON CO.,
Plaintiff-in-Error,

against

JOHN GILBERT,
Defendant-in-Error.

BRIEF FOR THE DEFENDANT-IN-ERROR

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Solicitors for Defendant-in-Error.

INGLE, Inc., 30 VESEY St., NEW YORK

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IN THE

Supreme Court of the United States

PHILADELPHIA & READING COAL & IRON CO.,
Plaintiff-in-Error,

against

JOHN GILBERT,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

The defendant-in-error's original motion was tripartite. He moved this Court either to dismiss or affirm, or to transfer the cause for hearing to the summary docket of the Court. While this Court transferred the cause to its summary docket, it did not pass upon, consider or deny the other alternatives, as is contended by the plaintiff-in-error. (Plaintiff-in-error's brief, p. 3.) Therefore, it is still open for the defendant-in-error to move for the dismissal of the writ of error.

The present motion to dismiss is based upon the grounds that the judgment rendered below can be reviewed in this Court only upon certiorari and that, moreover, it is not reviewable here at all, as no federal question is presented by the record.

On the other hand, an affirmance is asked upon the ground that if a federal question is involved it is merely colorable, and for the further reason that plaintiff-in-error waived the only federal right claimed.

The case is here upon writ of error to review a judgment of the Appellate Division of the Supreme Court of

the State of New York, in the Second Department (R., 65), that court being the court of last resort having jurisdiction to determine the case, which affirmed a judgment of $10,102.66 (R., 13) rendered in favor of the defendant-in-error after a trial before a court and jury in a personal injury suit.

The defendant here was the plaintiff below and when he commenced his action he was a resident of the State of New York (R., 5, 22, 43, 48.) While in the employ of the plaintiff-in-error, at its mines in Pennsylvania, he sustained injuries which resulted from its neglect (R., 5, 6).

The plaintiff-in-error was and is a Pennsylvania corporation, but when the action was commenced it was actually and admittedly doing business and was authorized to do business within the State of New York (R., 8, 9). It had an office in New York City, maintained depots and yards for the sale of coal in Buffalo, Rochester and Lyons, and had voluntarily designated an agent within the State of New York to receive service of process in its behalf, pursuant to the General Corporation Law of the State (R., 9; Answer, paragraphs 17 and 18).

This action was commenced by service of process within the State of New York, upon the agent of the plaintiff-in-error, so designated by it (R., 9; Answer, par. 19)

Shortly after the service of the summons and complaint upon its designated agent, plaintiff-in-error, appearing specially and solely for that purpose, moved to set aside the service of the summons and complaint (R., 55-61) upon the ground "that the defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent *can only be implied with respect to causes of action arising in connection with busi-*

ness the defendant transacts in the State of New York; the plaintiff's cause of action herein did not arise in connection with the business the defendant transacted in the State of New York, but is brought to recover damages for personal injuries alleged to have been sustained in the State of Pennsylvania. An attempt to compel the defendant to respond to this suit in the Supreme Court in the State of New York, sitting in Westchester County, is an invasion of the defendant's rights under the Constitution of the United States, particularly Section 1 of the 14th Amendment of said Constitution'' (R., 56).

The motion was overruled (R., 60), and thereafter, protesting that it reserved its alleged objection to the jurisdiction of the Court, the plaintiff-in-error answered (R., 73), pleaded to the merits of the cause of action against it, participated in the trial of the case before the court and a jury (R., 14-49), cross-examined the witnesses of the plaintiff below (R., 20-26), offered evidence in its own behalf (R., 31-41), moved to dismiss at the close of the case upon non-jurisdictional grounds (R., 30, 43) and finally moved to set aside the verdict which had been rendered against it and for a new trial upon the alleged grounds that the verdict was contrary to the law, contrary to the evidence, against the weight of evidence, and upon all the grounds set forth in Section 999 of the Code of Civil Procedure (R, 49).

All of those motions were overruled (R., 12, 13), and the plaintiff-in-error prosecuted its appeal to the Appellate Division of the Supreme Court of the Second Department (R., 2) and the cause was there heard and without opinion (R., 67) determined adversely to the plaintiff-in-error.

After exhausting its efforts to secure a review of the

judgment of affirmance in the Court of Appeals of the State of New York (R., 66) plaintiff here sued out this writ of error, predicating this Court's jurisdiction solely upon the claim that the judgment rendered below deprives the plaintiff-in-error of its property without due process, in violation of Section 1 of the 14th Amendment of the Constitution (R., 73).

POINT I.

The judgment rendered below, if reviewable in this Court at all, is so only upon certiorari and, therefore, the writ of error should be dismissed.

This Court issued this writ of error (R., 76) on *Feb. 10, 1917,* to review a final judgment of affirmance entered on *Dec. 29, 1916* (R., 65-73) in the highest court of the State of New York in which a decision in this suit could be had (R., 65).

An act entitled "An Act to Amend the Judicial Code, etc." Chap. 448, Section 2) was passed by Congress with a view of amending Section 237 of the Judicial Code. This amendment became effective *October 6, 1916.* It reads in part:

> "Section 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the

decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had; where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

In view of the date on which the writ of error was issued out of this Court, it is evident that the correctness of the plaintiff-in-error's procedure is to be tested by the provisions of the above amendment as the act to

amend the Judicial Code had by then been in full force and effect more than four months.

The plaintiff-in-error is not basing its right to a review on the fact that the judgment below drew in question "the validity of a treaty or statute of, or an authority exercised under the United States," or "the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States." On the contrary, his claim is and can only be based on the alleged assertion that the judgment below is against "the title, right, privilege or immunity" which it "expressly set up or claimed." Clearly, therefore, instead of suing out a writ of error, the plaintiff here should have brought the judgment below to the attention of this Court upon application for certiorari (see paragraph 2 of §237, *supra*).

We respectfully submit that since October 6, 1916, judgments, such as the one at bar assuming without conceding that the one here involved any federal question, may not be reviewed by this Court upon a writ of error as a matter of right.

It follows that the motion to dismiss should be granted.

POINT II.

The record presents no federal question or at most only a colorable one. The writ of error should, therefore, be dismissed or affirmed.

The real question presented by the plaintiff-in-error is the contention that its designation of an agent within the State of New York to receive service of process in its

behalf, pursuant to the General Corporation Law of that State, was limited to a consent on its part to be sued within the State of New York only upon causes of action arising therein, and since the cause of action herein involved resulted from personal injuries sustained in Pennsylvania, it may not, without its express consent and without violating the rights assured to it under the 14th Amendment, be sued thereon in the courts of the State of New York.

This assertion (A) is not only contrary to established law (B), but moreover involves no federal question of any kind.

A.

It is now settled that where a foreign corporation is doing business in a State other than the State of its origin and is there represented by a designated agent, he is its agent to accept service, though the cause of action has no relation to the business there transacted, and arose in another State.

Barrow S. S. Co. v. *Kane,* 170 U. S., 100, 105, 112;

Johnston v. *Trade Ins. Co.,* 132 U. S., 432;

The Robert Dollar Co. v. *Canadian Car & Foundry Co.,* 220 N. Y., 270;

Bagdon v. *Phila. & Reading C. & I. Co.,* 217 N. Y., 432, 438;

Wilson v. *Martin-Wilson Fire Alarm Co.,* 149 Mass., 24, 27;

Hawkins v. *Fidelity & Casualty Co.,* 123 Ga., 722;

Reeves v. *Southern Ry. Co.,* 121 Ga., 561, 563.

The court of last resort in the State of New York have, as a matter of local law, decided that the voluntary designation of an agent to receive process within the State of New York in behalf of a foreign corporation doing business within the State, authorized litigants to sue that corporation in New York upon any action which, under the laws of New York, may be brought there against such foreign corporation (*Bagdon* v. *Phila. & Reading C. & I. Co.*, 217 N. Y., 432, 438).

The causes of action upon which a foreign corporation is liable to be sued in New York, are specified in Section 1780 of the New York Code of Civil Procedure, which is as follows:

> "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases:
>
> 1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.
>
> 2. Where it is brought to recover real property situate within the State, or a chattel which is replevined within the State.
>
> 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> 4. *Where a foreign corporation is doing business within this State.*"

The method of serving process in the State of New York upon foreign corporations is regulated by Section

432 of N. Y. Code of Civil Procedure, which is in part as follows:

> "Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof within the State as follows: * * * 2. To a person designated for the purpose as provided in Section 16 of the General Corporation Law * * *."

Section 16 of the General Corporation Law provides that before the granting of the certificate of incorporation, every foreign corporation shall be required to file in the office of the Secretary of State, among other things, a statement designating a person upon whom process against the corporation may be served within the State.

The Court of Appeals of the State of New York, on March 6, 1917, in the case of *Robert Dollar Co.* v. *Canadian Car & Foundry Co.* (*supra*), held that Section 432 of the Code of Civil Procedure, while unconstitutional in so far as it imports a right thus to acquire jurisdiction of corporations not doing business in that State, is a valid enactment with respect to corporations doing business there.

The construction thus placed upon the statute by the court of last resort of the State of New York, as well as the construction placed by the same court in the *Bagdon* case (*supra*) upon Section 16 of the General Corporation Law of the State of New York will be followed by this Court.

Moreover, that construction received the sanction of and was applied by this Court in *Barrow Steamship Co.* v. *Kane* (*supra*).

The admissions contained in the answer (R., 9) of the plaintiff-in-error, defendant below, were alone suffi-

cient to require the courts below to decide as they did, as a matter of fact, that it was doing business in New York when served with process, and hence, under all of the authorities, was amenable to suit in that State.

This finding, having adequate support in the record, will not be disturbed here (*Interstate Amusement Co.* v. *Albert,* 239 U. S., 560, 566, 567).

Even if this were not so, this Court could reach no other conclusion upon the record.

Besides, the plaintiff-in-error, in view of the answering allegations, is now estopped to deny that it was doing business in New York State.

> *Washington & Va. Ry.* v. *Real Estate Tr. Co.,* 238 U. S., 185, 186;
>
> *International Harvester Co.* v. *Commonwealth of Kentucky,* 234 U. S., 579, 585, 589;
>
> *St. L., S. W. Ry. Co.* v. *Alexander,* 227 U. S., 218, 223.

It is not important that the plaintiff-in-error claims that the defendant-in-error was not a resident of New York when suit was commenced. The record shows that that he was a resident (R., 5, 22, 43, 48), but since jurisdiction over the plaintiff-in-error depends upon the doing of business by it within the State and upon the designation of an agent to receive process in its behalf, it is immaterial where plaintiff below resided when the suit was commenced.

B.

The decision of the courts below that the plaintiff-in-error was properly sued in the New York Courts did not necessarily or actually involve the denial to the plaintiff-in-error of any federal right.

It is well settled that it must appear in the record that the federal right was presented, and distinctly ruled upon and denied.

Western Union Tel. Co. v. *Wilson,* 213 U. S., 52, 53;
Harrison v. *Morton,* 171 U. S., 38, 47;
Fowler v. *Lamson,* 164 U. S., 252, 255;
Eustis v. *Boles,* 150 U. S., 361, 366;
Powell v. *Brunswick County,* 150 U. S., 433, 439, 440.

And even though the federal question was raised it must also appear that the decision was not or could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the federal question.

Rogers v. *Jones,* 214 U. S., 196, 204.
Connecticut, ex rel., etc. v. *Woodruff,* 153 U. S., 689, 691;
Eustis v. *Boles,* 150 U. S., 361, 366.

It cannot be said that the judgment below was not and could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the federal question, which the plaintiff-in-error sought to introduce into the action.

The only question involved in that judgment was the liability of a foreign corporation actually doing business within the State and which had voluntarily designated an agent within the State to receive process in its behalf, to be sued in the courts of the State of New York upon a transitory cause of action.

Mr. Justice HOLMES in *Pa. Fire Ins. Co.* v. *The Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95, said:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case there would be no doubt of the jurisdiction of the State court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, Lake Erie & Western R. R. Co.* v. *Estill*, 147 U. S., 591. It did appoint an agent in language that rationally might be held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S., 20, 26. Other state laws have been construed in a similar way; *e. g.*, *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y., 432; *Johnston* v. *Trade Insurance Co.*, 132 Mass., 432.
>
> The defendant relies upon *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S., 8, and *Simon* v. *Southern Ry. Co.*, 236, U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the Court below, quoting a brief and pointed statement in *Smolik* v. *Philadelphia & Reading Iron & Coal Co.*, 222 Fed. Rep., 148; a statement rein-

forced by CARDOZO, *J.*, in *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y., 432. In the above mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon cases of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched (236 U. S., 129, 130). If the business out of which the action arose had been local, it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by LEARNED HAND, *J.*, in 222 Fed. Rep., 148, 152, this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Insurance Co.* v. *French*, 18 How., 404; *Michigan Trust Co.* v. *Ferry*, 228 U. S., 346, 353. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. The *Eliza Lines*, 199 U. S., 119, 130, 131."

The suit in the above case was brought upon a policy issued in Colorado by the plaintiff-in-error, to the defendant-in-error, an Arizona corporation, insuring buildings in Colorado. The insurance company had obtained a license to do business in Missouri, and to that end, in compliance with the statute, had filed with the superintendent of insurance a power of attorney, consenting that service of process upon the superintendent should be deemed personal service upon the company. The suit was begun by service upon the superintendent. The in-

surance company set up that such service was insufficient except in suits upon Missouri contracts, and that if the statute were construed to govern the present case, it contravened the 14th Amendment by denying to the defendant due process of law. The Supreme Court of Missouri held that the statute applied and was consistent with the constitution of the United States, and this ruling was affirmed by this Court.

The above case is clearly on all fours with the one at bar. There, as here, the suit was based upon a transitory action which arose outside the State and the corporation concerned was a foreign corporation.

We respectfully submit, therefore, that the opinion rendered therein is controlling upon the issue now before this Court.

Plaintiff-in-error, however, seeks to avoid the effect of that decision by the statement that it is transacting *interstate* business: mining anthracite coal in Pennsylvania and selling it in every State of the Union including New York.

In support of its contention, it cites the case *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 1 (brief of plaintiff-in-error, p. 7). It appears, however, from the report of that case that the State of Kansas had passed an act requiring all foreign corporations, not only to pay the regular fee for the privilege of doing business in Kansas, but in addition a further fee "for the benefit of the permanent school fund" of a given percentage upon their total authorized capital representing all of their business interests and property everywhere within and without the State. Domestic corporations doing interstate business were not required to pay the second fee. So that in that case this Court was presented with an issue involving

discrimination and an attempt by the State of Kansas to tax the property beyond the limits of the State and a judgment which expressly sought to reconcile the Kansas statute with the 14th Amendment of the Constitution. There is no similarity between such a case and the one at bar. Here there is no attempt to burden interstate commerce nor is there any effort to tax property beyond the State.

The judgment below simply involved the construction of a contract entered into between the State of New York and the plaintiff-in-error. The construction adopted is in accord with the principle governing transitory actions, which has been applied in England since Lord MANSFIELD's decision in *Moslyn* v. *Fabrigas,* Cowp. 161, 176, and in this country since Justice MARSHALL enforced it in the case *Livingston* v. *Jefferson,* 15 Fed. Cas., 8411.

Since the contract was made in New York, it must be construed in the light of the laws of the State of New York. This contract provided that, in order to obtain a certificate authorizing the plaintiff-in-error to do business within the State of New York, it should file a stipulation in the office of the Secretary of State designating a person upon whom process might be served. This consent contained no exception limiting the cases in which the plaintiff-in-error might be sued in New York. The assertion that this consent was limited to causes of action arising in connection with its business conducted in the State of New York, seeks to read into the contract an exception not expressed therein or one which may be implied from its terms or from the statutes pursuant to which the consent was given.

The contract related to jurisdiction of the person and the appointment made under it relates to any action

which under the laws of New York State may be brought against the plaintiff-in-error.

That such is the effect of the contract appears from *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y., 432, 436, 437, 438, 439, where Judge CARDOZO said:

> "The meaning must, therefore, be that the appointment is for any action which, under the laws of this State may be brought against a foreign corporation (Code Civ. Pro., §§1780, 432). The contract deals with jurisdiction of the person. It does not enlarge or diminish the jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.
>
> "The line of division between this case on the one side and *Simon* v. *Southern Ry. Co.* on the other is, therefore, a clear one. It was marked with discrimination in the opinion of Judge LEARNED HAND, sitting in the United States District Court for the Southern District of New York in a case against the same defendant (*Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 22 Fed. Rep., 148). The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction. The defendant in *Simon* v. *Southern Ry. Co.* had never consented to be bound by service on a public officer. Actually, it might have refused to appoint, and yet its refusal would make no difference" (HAND, *J.*, in *Smolik* v. *Philadelphia & Reading Coal & Iron Co., supra*) * * *. A very different problem is the one before us. The statute is different; the condition of the corporation subject to it is different. The statute makes no provision for service on a public officer if a designation is not filed; the corporation may withhold its stipulation and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege, it has made a voluntary appointment of an

> agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract * * *. But when a corporation is engaged in business in New York and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted. That was held in *Barrow S. S. Co.* v. *King* (170 U. S., 100) * * *. An officer and agent alike are in the service of a corporation engaged in business in this state. Their presence in that state has brought the corporation within their jurisdiction; and in coming here, it has become subject to the rule that transitory causes of action are enforcible wherever the defendant may be found. * * * We think there is nothing to the contrary either in the decision of the Supreme Court of the nation or in the guaranty of due process under the Federal constitution."

To the same effect is the opinion rendered in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed., 148; approved in *Pa. Fire Ins. Co.* v. *The Gold Issue Mining & Milling Co.*, 243 U. S., 93 (*supra*).

The facts in *Barrow Steamship Co.* v. *Kane* (*supra*) are identical with those in the case at bar.

In that case a steamship company, organized in England, but plying business in the State of New York, was sued for an assault committed upon a passenger traveling on one of its steamers. The victim was a citizen and a resident of the State of New Jersey. The assault occurred in the port of Londonderry, Ireland. The suit was brought in the Circuit Court of the United States for the Southern District of New York.

The Court said:

> "It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit

could be maintained against it *in personam* in this country without its consent, express or implied; that by doing business in the State of New York it consented to be sued only as authorized by the statutes of the State; that the jurisdiction of the courts of the United States held within the State depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the State; and, therefore, that the Circuit Court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them. * * * *Louisville, &c., Railroad* v. *Letson*, 2 How., 497, 558; *Marshall* v. *Baltimore & Ohio Railroad*, 16 How., 314, 329; *Muller* v. *Dows*, 94 U. S., 444; *Steamship Co.* v. *Tugman*, 106 U. S., 118; *St. Louis & San Francisco Railway* v. *James*, 161 U. S., 545, 550-559. * * *

"The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

"Accordingly, in *Railroad Co.* v. *Harris*, 12 Wall. 65, the Baltimore and Ohio Railroad Company, a corporation chartered by the State of Maryland, and authorized by the statutes of the State of Virginia, and also by the act of Congress of March 2, 1831, c. 85, 4 Stat., 476, to extend, construct and use a lateral branch of its railroad into and within the District of Columbia, and to exercise the same powers, rights and privileges, and be subject to the same restrictions in regard

thereto, as provided in its charter, was held, by reason of the act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the State of Virginia; although the railroad company was a corporation of the State of Maryland only, and neither the act of Congress authorizing it to construct and use a branch railroad in the District of Columbia, nor any other act of Congress, had made any provision for bringing suits against foreign corporations, the action having been brought before the passage of the act of February 22, 1867, 2. 64, §11; 14 Stat. 404; Rev. Stat., D. C., §790. Mr. Justice SWAYNE, in delivering judgment, said: 'If the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the suit of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results. But turning our attention from this view of the subject, and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality.' 12 Wall. 83, 84.

"In that case, it is to be observed, the cause of action arose neither in the State of Maryland, where the defendant was incorporated, nor in the District of Columbia, where the action was brought, but in the State of Virginia. The decision, in

> principle and in effect, recognizes that a corporation of one state, lawfully doing business in another State, and summoned in an action in the latter State by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought."

The plaintiff-in-error, by filing the consent to be sued entered into a contract which placed no limitation upon the class of actions in which it might be sued.

There is no theory upon which the enforcement of this contract by the judgment below can be held to raise a federal question or can be considered as a violation of any constitutional right of the plaintiff-in-error.

Certainly no theory based upon the principle of transitory actions or upon the ground that the New York Statute discriminates between individuals and corporations, or upon any distinction between intrastate and interstate commerce, can be invoked to inject a federal or constitutional question into this case.

The judgment below raises only the question whether the consent of the plaintiff-in-error to be sued included the right to serve its agent in all cases upon which, under the law of New York State, an action might be maintained against it.

This question has been answered adversely to the contention of the plaintiff-in-error.

It follows, therefore, that since there is no federal question here involved or at least only a colorable one, the writ of error should be dismissed or the judgment affirmed.

POINT III.

The plaintiff-in-error waived the only federal right it claimed.

The plaintiff-in-error waived its objection to jurisdiction over its person by answering and participating in the trial of the action upon its merits.

Western Loan Co. v. *Butte & Boston M. Co.*, 210 U. S., 368;
Central Tr. Co. v. *McGeorge*, 161 U. S., 129, 322;
Interior Construction & Imp. Co. v. *Gibney*, 160 U. S. 217, 220;
In re Keasburg & Mattison Co., 150 U. S. 221, 229;
Ex Parte Schollenberger, 96 U. S., 369, 376;
Rhode Island v. *Massachusetts*, 2 Pet. 657.

The plaintiff here has overlooked the distinction between objections raised to a court's jurisdiction over the subject matter of the suit and over the person of the objector. The latter is the issue here and, according to the rule laid down in *Rhode Island* v. *Massachusetts*, *supra*, it must be held to have waived its objection.

The judgment should therefore be affirmed.

Respectfully submitted,

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Solicitors for Defendant-in-Error.

Dated, November 5th, 1917.

Office Supreme Court, U. S.
FILED
SEP 26 1917
JAMES D. MAHER
Clerk

Supreme Court of the United States

OCTOBER TERM, 1917
No. 454

PHILADELPHIA & READING COAL & IRON COMPANY,
Plaintiff-in-Error,

against

JOHN GILBERT,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

MACKLIN BROWN & PURDY,
Attorneys for Plaintiff-in-Error,
17 Battery Place,
New York City.

PIERRE M. BROWN,
of Counsel for Plaintiff-in-Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917, No 454.

PHILADELPHIA & READING COAL & IRON COMPANY,
Plaintiff-in-Error,

AGAINST

JOHN GILBERT,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement.

This case comes here on writ of error directed to the Supreme Court of New York.

The defendant-in-error sued the mining company for damages for personal injuries sustained by him while working as a miner in Pennsylvania. The action was begun in the Supreme Court of New York, service of the summons being made upon James Armstrong, the agent of the company, appointed by it pursuant to Section 16 of the General Corporation Laws of New York, Chapter 28, Laws of 1909, also known as Chapter 23, Consolidated Laws.

The mining company before answering filed a special appearance for the motion only (pp. 57 & 59 Record) and moved the court to set aside the service of the summons upon the grounds:

1st: That the business it transacted in New York was interstate, to wit: it mined coal in Pennsylvania and sold it in New York (pp. 56 & 57 Record).

2nd: That as a condition of closing such business in New York, it was required to file the said designation of a local agent.

3rd: That while the state might require the appointment of an agent upon whom process in local actions might be served, it was not in its power to exact, as a condition of doing such lawful interstate business, that the corporation should consent to be sued in personal injury cases arising outside the state and that the right to impose such condition extended only with respect to causes of action arising out of business transacted in the state.

4th: That the true construction and meaning to be given to the Statute and the consent limits its application as above and a construction extending it to include causes of action wherever arising would be in violation of Section 1 of the 14th Amendment and the interstate clause of the Constitution (p. 56, Record).

None of the facts set forth in the motion papers were controverted by defendant-in-error, no opposing affidavits being filed. The motion was denied without opinion (p. 59, Record), and under protest defendant answered (p. 7, Record).

Trial was had and the same objection urged

and overruled (p. 43, Record), and judgment went against the mining company. The latter appealed to the Appellate Division, where the judgment was affirmed without opinion and its application for leave to appeal to the Court of Appeals was thereafter denied (pp. 65 to 67, Record).

Thereupon this writ of error was sued out. A motion was made by defendant-in-error to dismiss or affirm and same was denied by this Court.

The questions raised are:

1st: Did plaintiff-in-error waive its objection to being sued by filing an answer after its attempt to set aside the service had failed?

2nd: Should not the Statute and the designation of the agent be construed as applying to causes of action arising out of the business the corporation does in the state, since the broader construction sought would be an unlawful burden imposed upon interstate business?

THE ARGUMENT.

POINT I.

Plaintiff-in-Error did not waive the objection to being sued by filing an answer, under protest, and after its motion to set aside had been denied.

The alternative course open to plaintiff-in-error was to suffer judgment to go by default and take the chance of its contention, as to service, being sustained. For if overruled, it is more than probable that the year allowed, by the New York Code, to apply to open the judgment would have expired. And the granting of such application being discretionary, it might be denied.

The plaintiff-in-error followed the practice pursued in

> *Philadelphia & Reading Railway Co.* v. *McKibbin*, 37 Sup. Ct., 280.
> *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U. S., 189; 59 L. Ed., 910.

The case of *Western Loan Co.* v. *Butte & Boston M. Co.*, 210 U. S., 368, cited by defendant-in-error upon the motion to dismiss, etc., was an instance where the attack upon the jurisdiction was combined with one upon the merits.

Reed v. *Chilson*, 142 N. Y., 152, was where a general appearance was first filed.

Indeed, both cases point out that the practice here adopted is right.

Mr. Justice Gray in *Southern Pacific Co.* v. *Denton*, 146 U. S., 202 (36 L. Ed., 942), said:

"Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection. The case is within the principle of Harkness *v.* Hyde in which Mr. Justice Field, speaking for this Court, said:

> 'Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived, 98 U. S., 476, 479 (25:237, 238)'."

POINT II.

A State Legislature cannot, by the express provisions of a statute, impose, as a condition of doing an interstate business, the burden of compelling the company to litigate controversies having no relation to the business done in the State.

And as a corollary thereto:

The designation, by a corporation doing an interstate business, of an agent upon whom process can be served, cannot be lawfully so construed as to apply to such foreign claims.

This question has not been determined by this court and was left open by the decision in *Simon* v. *Southern Railway Co.*, 236 U. S., 115, 59 L. Ed., 492.

We think it can be made clear by both reason and authority that the Legislature of New York has not, in fact, and cannot require as a condition of doing a lawful interstate business, that a foreign corporation must defend in its courts controversies arising in the home or other states.

The rule for which we contend, to wit; that the consent to be used relates to the transactions done in the State, is just and reasonable; it imposes no hardship upon any litigant, while the contrary would place upon such interstate commerce a most serious burden without any necessity or reason for its existence.

(The italics in quotations are ours.)

The situation that confronted the mining company was this:

It employed about forty thousand men in Penn-

sylvania, mining anthracite coal, which was shipped into and sold in almost every State of the Union.

It maintained in New York a permanent office and salesmen, to obtain orders, accepted in and filled from Pennsylvania, and storage depots for the distribution of the coal.

It was an interstate business and protected from any burden imposed by the State, except such as had some reasonable relation to the health or safety of the citiens of New York.

Western Union Telegraph Co. v. *Kansas*, 216 U. S., 1; 54 L. Ed., 355.

In that case Mr. Justice Harlan points out that the state regulation of commerce must be established in good faith for the protection of the people and be referable to the police powers of the state.

> "The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a state for purposes of its business, is subject to local regulations that, in their essence and purpose, only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the

> people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the state," p. 24.

It could conduct this business without being required to obtain the consent of any state officer and could, without such consent, *sue* in the local courts.

> *Sioux Remedy Co.* v. *Cope*, 235 U. S., 197, 59 L. Ed., 193.

But although the business transacted was interstate, it was nevertheless the doing of business in New York.

> *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y., 259,
> *International Harvester Co.* v. *Kentucky*, 234 U. S., 579, 58 L. Ed., 1479.

And the state might reasonably require the appointment of a local agent upon whom process could be served, so that a citizen of New York, who bought coal from the company in New York, should not be compelled to go to Pennsylvania to enforce his demands.

In *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S., 147, 47 L. Ed., 987, it was said, p. 158:

> "This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaged in business within its limits shall submit to *controversies growing out of that business* to its courts, and not compel a citizen

having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims."

In *St. Clair* v. *Cox,* 106 U. S., 350, 27 L. Ed., 222, it was said:

"As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities *there* incurred.
* * *

"The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it *for business there done,* process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process."

Such being the situation, the mining company, following the statute, designated an agent "upon whom process against the corporation may be served within the state."

The law was and now is as follows:

Section 16 of the General Corporation Law of New York requires the filing of a certificate

> "setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, * * * designating a person upon whom process against the corporation may be served within the state."

It contains also this significant statement after providing for a case where the designated agent dies or removes, or the corporation revokes the consent, etc.

> "The Secretary of State may revoke the authority of the corporation to do business within the state and process against the corporation in an action upon any *liability incurred within the state* before such revocation, may, after death or removal, or revocation of consent and before another designation is made, be served upon the Secretary of State."

This is a clear indication that the Legislature contemplated only actions upon liabilities incurred in the state.

The possibility that this statute and designation would be broadened by subsequent decisions of the New York courts so that the corporation would be required to litigate in that state suits

for injuries sustained at the mines, and by miners, who, even remained residents of Pennsylvania, would never have occurred to it or to any one. A plaintiff usually prosecutes his suit where he is domiciled, where the accident occurs, where the witnesses live and where the defendant and its property is located. And it could hardly be conceived that a state could have any desire to have such foreign controversies litigated at its expense.

Yet, by steadily consistent legislation and by decisions of its courts, New York has established:

1st: That the business done by these mining companies, though interstate, is still business done in New York and service upon a selling agent is a good service *in personam* and irrespective of where the cause of action arose.

Tauza v. *Susquehanna Coal Co., supra.*

2nd: That the appointment of an agent upon whom process may be served constituted a bargain between the corporation and the state that it could be sued in New York, not only upon claims arising out of the business it does there, but wherever arising.

Bagdon v. *P. & R. C. & I. Co.*, 217 N. Y., 432.

3rd: That the residence of the plaintiff is immaterial and a miner injured in Pennsylvania may ship his cause of action into New York, where the local courts may compel the defendant to try it and

> remit the proceeds of any recovery to the plaintiff in Pennsylvania.
>
> Subd. 4 of Sec. 1780, *N. Y. Code of Civil Procedure*, in effect Sept. 1, 1913.

Living is higher and money correspondingly cheaper in New York than in the mining districts of Pennsylvania and West Virginia, and while in the latter regions a verdict of $15,000.00 for the loss of an arm is at least an ample one, one of $50,000.00 in New York for the same injury is of common occurrence. The result has naturally followed that New York has become the Mecca for an Hegira, from Pennsylvania, of injured miners. Indeed, they do not even have to abandon their residence under the provisions of subdivision 4 of Section 1780 (*supra*), which permits a non-resident of New York to sue a foreign corporation upon a foreign cause of action, if defendant does any business in New York.

Hundreds of these cases, advertised for by the attachés of New York law offices, have been in the past few years imported into the state and the damages claimed run into millions of dollars.

The evil consists not alone in subjecting the defendant to being compelled to transport, if it can, witnesses to another state and there litigate these controversies, but it reaches out wider than that.

It is familiar to the bar that legislation in some of the states has been ingeniously fashioned to attract legal business.

e. g., South Dakota and Nevada in divorce cases—until the industry was somewhat discouraged by decisions of this court, West Virginia and Arizona in the organization of corporations

with a minimum of assets and a maximum of capital stock, etc., etc.

It is not a rash assumption that, in the negligence business—one vastly more profitable to the contingently paid attorneys—legislation will be, and it has been, obtained to attract these cases.

While the law of the forum may not change the substantive *lex loci*, yet the way to recovery may be made easy by changes in the law, of remedy, of evidence, presumptions, etc.

It is not the subject of review in this Court, that the courts of one state construe the statutes or laws of another state (*e. g.*, the Employers Liability Act) contrary to the construction of the courts of the enacting state.

> Banholzer *v.* New York Life, 178 U. S., 402, 44 L. Ed., 1124.

In the case at bar it was held in New York that a miner may recover under the Pennsylvania Employers Liability Act even though he is violating an express provision of the mining law, although the contrary is the law laid down in Pennsylvania.

> Riley *v.* Pittston Coal Co., 224 Pa., 633.

The reasons why these cases are brought in New York are therefore clear.

That this condition is a very present and practical burden upon a corporation doing an interstate business is apparent.

If immunity for such suits cannot be obtained under the federal constitution, it will be necessary for such companies to abandon the maintenance of local offices and salesmen and resort to

the organization in every state of local and subsidiary corporations to which will be sold and delivered, in the home state, the merchandise which should be the subject of free interstate commerce.

Even if the mining company, in maintaining an office for sales in New York, could be considered as doing an intrastate business, the imposition of this utterly unreasonable burden upon all of its business cannot be sustained under the guise that it is a regulation of the intrastate business. Such was the decision in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 1, 54 L. Ed. 355.

The New York courts have been conspicuous in their efforts to hold jurisdiction over foreign corporations by service upon its officers, although the corporation did *no* business in the State, and for years it supported its views by ingenious reasoning in hostility to the law as laid down by this Court.

The history of this conflict is set forth in

> *Grant* v. *Cananea Consolidated Copper Company*, 117 A. D., 576.

In the same way by plausible reasoning, the same courts have sustained the right of the State to enter a judgment *in personam* against a corporation by service upon a selling or designated agent, no matter where the cause of action arose.

> *Tauza* v. *Susquehanna Coal Co., supra.*
> *Bagdon* v. *P. & R. C. & I. Co., supra.*

If these reasons are examined, they will be found to rest upon two grounds:

1st: A corporation required to do its inter-

state business through local selling agents is itself in the state by such agents, and service upon the latter is as valid as if the corporation was domestic.

Tauza v. *Susquehanna Coal Co.,* 220 N. Y., 259.

2nd: By the designating of an agent upon whom process can be served, pursuant to a statute, compelling such appointment, the corporation is deemed to have bargained or agreed with the state, that such service could be made even in actions having no relation to the business sought to be done in the state.

Bagdon v. *P. & R. C. & I. Co., supra.*

Before discussing the above, we think that the position we contend for with respect to these foreign corporations is made clear by presenting the respective situations of a non-resident *citizen* and such corporation, in connection with rules that seem to be well settled.

As to Intrastate Business.

A non-resident citizen has an absolute right to do this as freely as a resident.

A foreign corporation has no such right and may be excluded *in toto* by the state.

Pennsylvania Fire Ins. Co. v. *Gold Issue M. & M. Co.,* 243 U. S., 93.

The state may not extort *in advance* from such corporation an enforcible consent to waive

a constitutional right (*e. g.*, the right to remove a suit to a Federal Court).

Southern Pacific Co. v. *Denton,* 146 U. S., 202, 36 L. Ed., 942.

But *after* breach of the condition, the corporation may be excluded.

Security & C. Co. v. *Prewitt,* 202 U. S., 246, 50 L. Ed., 1013.

As to Interstate Business.

The right of the non-resident and the foreign corporation to transact such business is the same.

The foreign corporation could be required, as a condition of transacting such business, to appoint a local agent for the service of process.

Mutual Reserve Fund Life Ins. v. *Phelps, supra.*
St. Clair v. *Cox, supra.*

The corporation, and surely the non-resident would have the right to *sue* in the state courts upon causes of action arising there, and a condition imposed upon such right that it *consent* to be *sued* upon any cause of action would be unlawful.

Sioux Remedy Co. v. *Cope, supra.*

But a non-resident would clearly have the right to conduct his interstate sales through agents in the local state, and of course, he could not be subjected to a suit *in personam* unless he came personally into that state.

Can there be any sound reason why a corpora-

tion, having the same rights to do such business, should not have the same immunities?

It *must* transact its business through agents, and yet if it can be *personally* bound by service upon such agent, a burden is imposed upon its interstate business that the non-resident is free from.

As said before if such discrimination is lawful, it will become necessary for such corporations to organize local and subsidiary corporations in every state.

They will thus attain exactly the same result as if the contention we urge is sustained.

But such an onerous requirement, and one that *could* not in some cases be effected without changing the financial organization of the corporation, bond issues, etc., ought not to be required where interstate commerce by both citizen and corporation should be free and untrammeled.

It may be that the *reasoning* for the rule established by the New York courts has weight (and this will be discussed later), but surely it finds no support in any necessity of business and none is pointed out.

Take the case of a California corporation selling goods in New York through local agents and which has also a designated agent, and three possible cases suggest themselves.

(a) A resident of California is injured by the corporation in that state.

It will be somewhat difficult to find any *legitimate* reason for his sending his claim to New York and compelling the corporation to there litigate it.

(b) The corporation may be however a shell in California and its tangible assets be located in New York so that to realize, the plaintiff must either send his cause of action, or go there and sue.

But he may in either case proceed by attachment and obtain as complete a remedy as a judgment *in personam* in New York would afford him.

(c) A resident of New York, while temporarily sojourning in California, acquires his cause of action and prefers to sue in his own state. He may do so by attachment as above, but there is no logical reason why he should have the right to obtain a personal judgment from the accidental circumstance that the corporation does an interstate business in New York, and which had no relation to his cause of action.

It may be urged, however, that a different situation is presented where a corporation does an intrastate business in connection with its interstate business. *e. g.* Suppose the fact that a corporation sold a rejected cargo in New York, or in fact, in connection with its interstate business, sold some of it product by sales contracted for and consummated in New York and that as a lawful condition of doing such intrastate business, the corporation may be subject to personal suits and judgments in all causes of action.

This is not the law. Grant that the state might altogether interdict the interstate business.

It must do so directly and it cannot, under the guise of regulating or forbidding the intrastate business, impose a burden upon that which is interstate.

In *Western Union Tel. Co.* v. *Kansas, supra,* Judge Harlan said (p. 37):

> "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States."

And at page 22, quoting from the case of *Crutcher* v. *Kentucky,* 141 U. S., 47, 35 L. Ed. 649:

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that

the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such."

And at page 27:

"If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

In the above case, the State of Kansas might have hesitated to forbid the Telegraph Company from doing an intrastate business on account of the inconvenience to its citizens, but it could not place a burden upon the interstate business and say that the company had to discharge it, or else cease to do *intrastate* business. The state must take the responsibility of forbidding such business by direct act.

Going back to the two reasons hereinbefore set forth upon which the New York courts sustain their conclusions:

1st: That by maintaining local selling agents, the corporation is personally present in the state.

Much that could be said against this view has already been said. The company is no more present than is the non-resident citizen. The error, the very able jurist who wrote the opinion in *Tauza* v. *Susquehanna Coal Co., supra* (Judge Cardozo), fell into, was in his grasp of this court's decision in *International Harvester* v. *Kentucky, supra.*

That he relied upon that case is shown at page 267 of the report:

> "The decision of the Supreme Court in International Harvester Co. *v.* Kentucky, 234 U. S., 579, is precisely applicable."

But the cause of action in that case related exclusively to the very business done by the corporation in that state, a vital difference; that passed unnoticed by the learned Judge.

> 2nd: That by the appointment of a designated agent, the corporation made a bargain with the state to be sued upon every cause of action wherever arising.
>
> *Bagdon* v. *P. & R. C. & I. Co.,* 217 N. Y., 432.

The same judge (Cardozo) again spoke for the Court and the substance of the argument is as above set forth.

The New York statute, Sections 15 and 16, General Corporation Law, does not *in terms* require a foreign corporation to obtain a license to do business, but provides that it shall not do such business unless it designates an agent. Section 15 provides:

> "No foreign stock corporation * * * shall do business in this state, without first hav-

> ing procured from the Secretary of State a certificate that it has complied *with all the requirements of law* to authorize it to do business in this state."

These requirements are set forth in Section 16 and are as follows:

The filing of a copy of the certificate of incorporation; a statement of the business to be done and the location of the principal office; and a designation of

> "a person upon whom process against the corporation may be served within the state."

This is a perfectly reasonable requirement and one that could be imposed upon a corporation engaged wholly in interstate commerce.

> *Mutual Reserve Fund Life* v. *Phelps,*
> and
> *St. Clair* v. *Cox, supra.*

A fortiori could it be so imposed upon a corporation carrying on an intrastate, in connection with its interstate, business.

From the terms of the statute itself and bearing in mind the reasons therefore, it is NOT a reasonable conclusion that the corporation consented to be sued upon every cause of action. As to business not done in the state, it is not in the state.

Judge Hand in *Smolik* v. *P. & R. C. & I. Co.,* 222 Fed. 148, reasoned the same as Judge Cardozo in the Bagdon case.

Both decisions lack cited authority that sup-

port them and both rely upon original reasoning as above set forth.

Both decisions failed to take into account or refer to the distinction between intrastate business and interstate commerce.

The defendant-in-error, in his brief upon the motion to dismiss herein, fell into the same error and relied with confidence upon the case of *Pennsylvania Fire Insurance Co.* v. *The Gold Issue M. & M. Co.*, 243 U. S., 93.

It would probably seem to almost any court that it was unfortunate that the State of Missouri should require a Pennsylvania corporation to defend in Missouri a claim asserted by an Arizona corporation upon a contract made in Colorado and where the cause of action arose in Arizona simply because the corporation issued insurance policies in Missouri.

The short answer is that this court had not the power to extend relief. The writing of insurance has been held to be intrastate business from Paul *v.* Virginia, to date and the state could impose any condition it liked as a condition of doing such business.

The State of Missouri could construe this consent so as to impose an undoubted burden upon the right of the insurance company to transact this intrastate business and such construction would not raise a federal question.

Banholzer v. *N. Y. Life*, 178 U. S., 402, 44 L. Ed., 1124.

Allen v. *Alleghany Co.*, 196 U. S., 458, 49 L. Ed., 551.

Lloyd v. *Mathews*, 155 U. S., 222, 39 L. Ed., 128.

That rule, however, does not obtain where interstate commerce is concerned.

In *Western Union Telegraph Co.* v. *Kansas, supra*, at page 34, the Court, in speaking of *Paul* v. *Virgina* and other cases, where the right of the insurance company to do business in a local state, was considered, stated:

> "That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the Court to show that if it had been, a very different question would have been presented."

In *Sioux Remedy Company* v. *Cope*, 235 U. S., 197, it was held that the foreign corporation could *maintain suit* in the State Court upon an interstate sale, although it had not filed its articles of incorporation, etc.

A local statute required as a condition of maintaining such suit, among other things:

> "(2) That it shall appoint a resident agent upon whom process may be served in *any action* against it."

At page 205 the Court said:

> "The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the supreme court of the state has said, it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit

> in all the courts of the state by *whosoever chooses to sue it there.* If one state can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

If the denial of the right to sue on an interstate cause of action is a burden upon interstate commerce, it would surely seem that the compelling of an interstate corporation to submit in one state to controversies arising in another is far more a burden.

If New York can require a corporation to submit to be sued upon causes of action wherever arising, could it not, with equal or greater propriety, exact as a condition of doing business in the state that the corporation should *agree to sue* in New York every cause of action wherever arising if the defendant could be served, or his property be reached in the state. New Jersey and other states might impose the same condition, and if defendant could also be found in such other states, an impossible situation would confront the company.

The *Simon* case, 236 U. S., 115, 59 L. Ed., 492, differs only from the case at bar in that in the former the statute appointed the agent directly and in the latter indirectly, because the Company was lawfully required to appoint, as a condition of doing the interstate business.

There *is* no real difference. In both the objects to be achieved were identical—to have some one in the state to respond to process in suits growing out of the business there done.

The reasoning in the Simon case will apply to both cases.

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon ANY foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S., 147, 47 L. Ed. 987, 23 Sup. Ct. Rep. 707; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S., 603, 43 L. Ed. 569, 19 Sup. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully

exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S., 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the *statutory consent* of a foreign corporation to be sued does not extend to causes of action arising in other states."

Is it not clear that the designation under Sections 15 and 16 of the New York Statutes, required to be filed, is also statutory?

Similar views have been expressed by other courts where this question has arisen.

Peters v. *Neely*, 16 Lea (Tennessee), 275.

"The general rule is that jurisdiction of a court over a foreign corporation by service of process on a resident agent is limited to cases founded upon contracts made, or transactions occurring in the state. The reason of the rule is that the corporation expressly or tacitly consents to accept service of process on its agent in all matters in which it is permitted to act by comity without express authority."

So also in Georgia in the case of *Bawknight* v. *The Liverpool & London, etc. Co.*, 55 Georgia, 194, where the plaintiff sued a foreign corporation in Georgia on a judgment obtained in Florida, the agent of the company in Georgia being served. An extract from the opinion of the Supreme Court of Georgia is as follows:

"We are not aware of any case which has decided that a foreign corporation may be sued *in personam* here on a foreign judgment, or on a contract or debt of any sort with which the Georgia agency has had no connection. It would be strange if such were the law. A debt created in England by this English corporation could then be sued here; a debt made in China might be sued *in personam* here, where this corporation is allowed to live only for certain purposes, instead of being sued at home, where it lives for all purposes. There is good reason for so restricting the statute. The agent in Georgia might be able easily to defend a Georgia contract, where he made or supervised it, where all the witnesses lived and were accessible to him; but it would be difficult, nay, impossible, to defend an English or Chinese contract without great hazard and expense; and for the very reason that he could not well and readily defend such a contract, suit would be brought upon them here, judgment *in personam* be rendered, and then suit on that brought at the home office, and it be concluded without opportunity to defend on the merits."

An examination of every case, where a state has sought to impose a restriction upon interstate commerce, shows that there was at least some color of claims that it was for the interest of the state or its citizens. But in the instance at bar, it would be indeed difficult to find a shadow of reason why the state of New

York should be entitled to compel a corporation of California to try out in New York causes of action arising across the continent simply because the corporation sells goods in New York.

The difficulty is that the New York courts have put an illogical and unreasonable construction upon a perfectly reasonable statute and have succeeded so far in making it, by such construction, an unlawful burden upon interstate commerce.

The judgment should be reversed.

Respectfully submitted,

PIERRE M. BROWN,
Attorney for Plaintiff-in-Error.

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Supreme Court of the United States.

OCTOBER TERM, 1916. No. [redacted] 454

PHILADELPHIA & READING COAL AND IRON COMPANY,
Plaintiff-in-Error,

v.

JOHN GILBERT,
Defendant-in-Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

PIERRE M. BROWN,
Attorney for Plaintiff-in-Error,
Office and Post Office Address,
17 Battery Place,
New York City.

Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1916. No. 1027.

PHILADELPHIA & READING COAL & IRON COMPANY,
Plaintiff-in-Error,

vs.

JOHN GILBERT,
Defendant-in-Error.

Brief for Plaintiff in Error in opposition to motion to dismiss, or affirm.

POINT I.

The claim made by defendant in error that defendant has waived its right to sue out error by defending upon the merits after its attempt to set aside the service in the State Court had failed, is not sustained by the authorities.

Philadelphia & Reading Railway Co. v. *McKibbin*, decided by this Court March 6, 1917.
Riverside & Dan River Cotton Mills vs. *Menefee*, 237 U. S. 189.

POINT II.

The real question involved here is whether it is a lawful or logical construction to put upon an instrument designating a local agent upon whom process can be served, that the consent to be sued is extended to cover personal injury cases occurring outside the State and in no way connected with the business done in the State and where the business transacted is purely interstate.

This question is of the utmost importance and should be exhaustively argued and settled. And we contend that this point, left open in *Simon* vs. *Southern Railway Co.*, 236 U. S. 115, has not been covered, so as to foreclose discussion, by the recent case of *Pennsylvania Fire Ins. Co.* vs. *The Gold Issue Mining & Milling Co.*, 243 U. S. 93.

The situation in New York has become intolerable.

It is apparently the policy of that State to compel foreign corporations to defend these personal injury claims arising in the home of the company and even when the plaintiff lives in the home state of the corporation, simply because the company sells goods in New York, *Tauzza* v. *Susquehanna Coal Co.*, Court of Appeals of New York. Reported in *New York Law Journal*, March 16, 1917.

There is an utter absence of reason to sustain this construction of the consent to be sued, contained in the designation of a local agent.

The anthracite mining companies of Pennsylvania alone employ about 250,000 men, and accidents are inevitable and of daily occurrence.

In the past few years, it has become an established

business to sue these cases in New York, where money is cheaper and verdicts correspondingly larger, and where probably the prejudice which may be counted upon against the coal companies is invoked, and this without requiring the plaintiff to even come into the State of the forum and become a resident.

It is unimportant here that the defendant in error, plaintiff below, claimed to have moved his residence to New York, for the question of whether the service of the process was valid would be the same irrespective of plaintiff's residence, but it may be noted that the plaintiff's claim of residence rested upon his own declaration and was a sham (pp. 22 to 26, record). This question should have been submitted to the jury as was held in *Phila. & Reading* vs. *Skerman*, C. C. A. 2nd Cir., 230 Fed. 814, and as the trial Court refused to so submit (fol. 82, Record), the case should be considered as if he were a non-resident.

Indeed, under the provisions of Sec. 1780, Subd. 4, of the Code of Civil Procedure of New York, it would have made no difference if plaintiff had been concededly a non-resident.

If this service is valid, a miner injured in Pennsylvania may continue to reside there and ship his cause of action into New York to be tried, and if recovery is had, have the proceeds remitted to him in Pennsylvania.

We beg to submit by way of illustration the following example:

A California corporation wishes to place a salesman and its office in New York to promote the sale of a few carloads of oranges in the season.

This is doing business in New York as has been held by this Court in *International Harrester Co.* v. *Kentucky*, 234 U. S. 579.

It must therefore apply for permission to do business and it must appoint an agent in New York upon whom

process can be served and it does so, and thereby expressly consents to be bound by such service.

But in what cases?

Surely the purpose of the various States in enacting this legislation was to require the Corporation to respond to suits arising out of the business it sought to do there.

The Corporation could not ask to do business with citizens of New York and then when necessity arises in regard to a suit growing out of that business, shelter itself in its own State and compel the New York citizen to go to California to try his case.

In *Mutual Reserve Fund Life Asso.* vs. *Phelps,* 190 U. S. 147, 47 L. Ed. 987, it was said:

> "This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaged in business within its limits shall submit (to) *controversies growing out of that business* to its Courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims." (Italics ours.)

In *St. Clair* vs. *Cox,* 106 U. S. 350, 27 L. Ed. 222, it was said:

> "As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities *there* incurred. * * *
>
> The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation

> to do business within her limits, and at the same time provides that in suits against it *for business there done,* process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process."

But can it be conceived that it ever was the purpose of the legislature to say to the Corporation that it must not only consent to be sued by New York citizens with respect to the local business but it must also agree to respond to a suit in New York brought for personal injuries by a citizen and resident of California and which occurred in Calfornia?

If such extended construction of this consent to be sued had been contended for before the New York legislature that passed the Section 16 of the General Corporation law, would not that body have promptly said that New York was not concerned in such foreign causes of action and that the consent to be sued in no wise covered such cases?

Indeed it could well be argued that such a burden upon interstate commerce would not be tolerated by this Court and that no State had the right to impose such a preposterous and unreasonable requirement as a condition of doing business in its territory.

Judge Hand, however, so held in the case of *Smolik* vs. *Phila. & Reading,* 222 Fed. 148, and was followed by Judge Cardoza in *Bagdon* v. *Phila. & Reading,* 217 N. Y. 432. Both opinions proceeded upon the ground that the designation of an agent was to be construed as a bargain made by the Corporation with the State that it would consent to be sued in *all* cases, even those in favor of a resident of the foreign State. If there is any reason whatever in so enlarging this implied consent, it is difficult to see

it and an examination of the opinions, *supra*, fail to disclose any foundation for such an extraordinary deduction. The true and simple theory upon which this question should proceed to solution is this, the foreign Corporation is in New York for the purpose of doing business there and it should respond to suits arising out of that business whether at the instance of citizens of New York or citizens of any State and that is as far as this implied consent should be carried.

But it is not in New York at all with respect to the business it does in its home State, and service upon it in respect of such business should no more be valid than if it did no business in New York and it should be considered accordingly. If the appointment of the local agent had not proceeded in the general words as fixed by the Statute and had limited the consent to be sued to causes arising out of the business then done, we think the State might well have been compelled to accept the same and permit the Company to do business. And we submit that the consent as filed should be construed in no broader sense.

The business done by *insurance companies* in the several States is not interstate commerce. The distinction is pointed out in

Hooper vs. *California*, 155 U. S. 648.

The Missouri Supreme Court has held that a foreign insurance company, which applied to do business in that State, was deemed to be a domestic corporation.

State vs. *Grimm*, 143 S. W. 483.

A State cannot impose an unlawful requirement as a condition of doing an interstate business.

Home Ins. Co. vs. *Morse*, 20 Wall. 445.

The argument of the defendant-in-error in the *Pennsylvania Fire Insurance Company* case proceeded upon

the ground that the business done by the insurance company was purely intrastate and the distinction between that case and where interstate commerce was concerned was conceded.

POINT III.

The distinction between the case at bar and that of *Pennsylvania Fire Insurance Co.* vs. *The Gold Issue Mining & Milling Co.*, 243 U. S. 93, is clear.

1st: The plaintiff-in-error is engaged in interstate commerce.

It mines coal in Pennsylvania and ships it to New York for sale, and none of its mining operations are conducted in New York. (See motion to set aside service, p. 59, Record.)

The distinction that should and does obtain between the case of an *intrastate* business where the State may impose any requirement it chooses, and an interstate business is clear.

If the business of the country is to continue between the States, controlled, as was contemplated by the Constitution, by Congress, no State should be permitted to impose a requirement that is obviously not one that relates to the business there done.

A State could probably impose a tax upon the local business commensurate with and as compensation for the protection the State's laws gives to the corporation. But a requirement that all of the corporation's executive

officers should reside in the State or that an arbitrarily fixed portion of its capital should be there invested, making it impossible of performance if each State should adopt the same rule, or as in the case at bar, that it should consent to be sued in respect of cases arising at its home, cannot be held to be reasonable or valid, if interstate commerce is to go on.

It might even be held to be a just exercise of a State's rights that as a condition of doing an interstate business in its borders, the corporation should consent to be sued by persons who resided in the State when the cause of action arose; though this is debatable, but there can be no reasonable justification for requiring it to submit to a suit at the instance of a plaintiff who moves away from the State where the action arose and who could not possibly have made the corporation respond to his suit if it were not doing business in the State to which he removed.

Such a plaintiff ought not to acquire any rights other than he would have had if the corporation did not happen to be doing business in the State to which he removed.

The practical evil of this is also well illustrated by the case at bar and the hundreds of others that have come up in New York, especially brought by these injured miners.

They move, or claim to move, to New York and to become residents. The Court ignores the question as it did here, or assume that it finds in favor of his residence, in either case it requires the defendant to litigate controversies far removed from the place of their origin and which have no relation whatever to the purposes for which the corporation came into the State.

This distinction between imposing burdens upon corporations doing intrastate business and those engaged in interstate business has been considered by this Court in a long line of cases from *Paul* vs. *Virginia*, 8 Wall. 168,

19 L. Ed. 357, to *Pullman Co.* vs. *Kansas*, 216 U. S. 56, opinion of Justice White, subdivisions 1 and 4.

The remarks of this Court in the *Simon* case apply.

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S. 147, 47 L. Ed. 987, 23 Sup. Ct. Rep. 707; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 603, 43 L. Ed. 569, 19 Sup. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S. 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state (13 Pet. 519). This consent may be accompanied by such conditions

as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this Court, *provided they are not repugnant to the Constitution or laws of the United States*, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense".

Lafayette Ins. Co. v. *French*, 18 How. 404; 15 L. Ed. 451, 452.

Quoted with approval in *St. Clair* v. *Cox*, 16 Otto, 350; 27 L. Ed. 222, 225.

"*As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.* * * * In all the cases in which this Court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it is uniformly asserted that *no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States.* (Citing numerous authorities.)"

Barron v. *Burnside*, 121 U. S. 186; 30 L. Ed. 915, at 920.

In the case of *Hooper* v. *California*, 155 U. S. 648, 39 L. Ed. 297, the Court, in considering the power of a State over foreign corporations, said, at page 301:

"The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, *subject, always, of course, to the paramount authority of the Constitution of the United States.*"

And again, in *Dayton Coal & Iron Co.* v. *Barton,* 183 U. S. 23; 46 L. Ed. 61, at 64, the Court showed clearly its recognition of this principle:

> "We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state. (Citing authorities.)
>
> "It has from an early day been held that a corporation created by one state could transact business in another state only with the consent, expressed or implied, of the latter state, and that such consent might be accompanied by such conditions as the latter state might think fit to impose, *provided they were not repugnant to the Constitution or laws of the United States,* or inconsistent with those rules of public law which secure the jurisdiction and authority of each state free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." (Citing many cases.)
>
> *Cable* v. *U. S. Life Insurance Co.*, 191 U. S. 288; 48 L. Ed. 188, at p. 194.

In *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 54 L. Ed. 355, the Court was considering the validity of a charter fee imposed by the laws of Kansas, and after reviewing a number of the cases, says, at page 369:

> "Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"

Baltic Mining Co. vs. *Mass.*, 231 U. S. 68; 58 L. Ed. 127, at page 133, where it is said:

> "The right of a state to exclude a foreign corporation from its borders, *so long as no principle of the Federal Constitution is violated in such exclusion*, has been repeatedly recognized in the decisions of this Court, but the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, *unless some contract right in favor of the corporation prevents, or some constitutional right is denied* in the exclusion of such corporation, is but the correlative of the power to exclude. (Citing numerous authorities.) For example, *a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law;* * * * To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

And in *So. Carolina* v. *McMaster*, 237 U. S. 63; U. S. Adv. Ops. 1914, 504, at 506, as late as April 5, 1915, the Court reiterates:

> "It was within the power of the state, *so long as it did not impose upon the company as a condition of doing business within the state any deprivation of rights secured to it under the Federal Constitution* to determine for itself the conditions upon which such foreign corporation could do business within the state. This principle has been often affirmed by the decisions of this Court, and the insurance company, being within that class of companies not doing any interstate business, the state might, in the exercise of its lawful authority, exclude it from doing business within the state, *so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged.* See *Harrison* v. *St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 333; 58 L. Ed. 621, 626, 627;

34 Sup. Ct. Rep. 333, and cases in this court therein cited."

2nd: The Missouri statute, Section 7042, which was under consideration in the *Pennsylvania Fire Insurance Co.* case, is much broader than Sec. 16 of the General Corporation Law of New York. The two statutes are as follows:

Sec. 7042 Statute of Missouri:

> "Sec. 7042. Any insurance company not incorporated by or organized under the laws of this State, desiring to transact any business by any agent or agents in this State, shall first file with the Superintendent of the Insurance Department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for and in behalf of such company, in any court of this state, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent shall be valid and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state. * * *"

Sec. 16 of the General Corporation Law of New York requires the filing of a certificate

> "setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, * * * and designating a person upon whom process against the corporation may be served within the state".

It contains also this significant statement after providing for a case where the designated agent dies or removes, etc.:

> "The Secretary of State may revoke the authority of the corporation to do business within the state and process against the corporation in an action upon any *liability incurred within the state* before such revocation, may, after such death or removal, or revocation of consent and before another designation is made, be served upon the Secretary of State."

This is a clear indication that the Legislature contemplated only actions upon liabilities incurred in the State.

But the New York Courts have read into the statute that the corporation must agree, as a condition of doing business in that State, to subject itself to service in all actions, no matter where they arise and irrespective of the residence of the plaintiff. This is the portion of this statute, so created by judicial interpretation, that we contend is in violation of the Federal Constitution and that such a requirement can not be lawfully imposed as a condition of doing interstate business.

Judge Hand, in *Smolik* vs. *P. & R. Coal and Iron Company,* 222 Fed. 148, in denying defendant's motion to set aside the service of the summons, said:

> "The question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state? * * *"

Pointing out the difference between "express" and "implied" consent, the Court says:

> "The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon* v. *Southern Railway, supra,* and *Old Wayne Insurance Co.* vs. *McDonough, supra.* The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and where that meaning calls for wide application, such must be given".

We agree with the reasoning of the learned Judge, but not with his conclusions.

It certainly *is* a question of determining "the intent of the state statute". We contend that it was the clear intent of that statute to compel the corporation to accept service in cases arising out of the business done in that State, and it could not have been in the mind of the Legislature that foreign causes of action should be tried in the State.

The question here is of vital importance to every corporation doing an interstate business.

To escape the burdensome evil of having to bring witnesses (even if they consent) from distant States and try cases such as this, it will be necessary for the corporation to resort to some such device as establishing local corporations in every State of the Union to which its goods will be sold and delivered in the home State, a burden upon commerce for which no reason can be found.

The matter should be exhaustively presented, and this summary motion should be denied, or the judgment of the State Court reversed.

Respectfully submitted,

PIERRE M. BROWN,
Attorney for Plaintiff-in-Error.

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 454.

PHILADELPHIA & READING COAL & IRON COMPANY,

Plaintiff-in-Error,

against

JOHN GILBERT,

Defendant-in-Error.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

MACKLIN, BROWN & PUDDY,
Attorneys for Plaintiff-in-Error,
17 Battery Place,
New York City.

PIERRE M. BROWN,
of Counsel for Plaintiff-in-Error.

L. MIDDLETON, PRINTER, NEW YORK.

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SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA & READING COAL AND IRON COMPANY,
Plaintiff-in-Error,

AGAINST

JOHN GILBERT,
Defendant-in-Error.

October Term, 1917.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

POINT I.

The question here presented is properly brought up by writ of error.

The defendant-in-error contends under Section 237 of the Judicial Code that this question should be raised by a writ of certiorari.

Since Section 4 of the act approved September 6th, 1916, provides that no writ of error should be dismissed because an appeal has been taken, or *vice versa*, and that the error should be disregarded, it is probable that this is immaterial.

But the defendant-in-error is clearly wrong. The claim that we make here is that the plaintiff is invoking a right under a statute of the state which we claim is invalid and therefore under the first paragraph of Section 237, the writ of error is the proper method of raising the question.

The provision as to certiorari is an entension of the jurisdiction of the Supreme Court by pro-

viding for a review where the decision may be *in favor* of a right claimed under the Federal Constitution or a federal statute.

POINT II.

The decision of this court in the case of SIOUX REMEDY CO. v. COPE, 235 U. S., 197, seems to be conclusive of the question here presented.

That case established the following:

1st: That a statute which required a corporation to consent to be sued upon any cause of action was not valid.

2nd: That such a statute, if limited to causes of action arising out of the business the corporation does in the state, is a reasonable regulation and is valid.

The New York statute in question does not by express terms require a corporation to submit to controversies wherever arising, and as pointed out in our main brief, the only reasonable construction, taking all the provisions of the statute into consideration, is that it was limited to causes of action arising out of business done in the state.

A mining corporation, therefore, could not, without grave peril, refuse to obey this reasonable requirement, for if it failed to designate an agent under the statute and was compelled to sue in the State Court to recover for goods sold, it might well have been met with the argument

that it failed to comply with a reasonable statute and its right to sue would be denied.

The construction claimed for by the defendant-in-error, if sustained, would produce a rather curious result. A corporation which refrained from obeying this reasonable requirement of the statute would be in better position than one which did.

For the corporation refusing to designate an agent could be sued by service upon the Secretary of State, but only with respect to causes of action arising out of the business there done; while, if it did appoint a designated agent to meet this lawful requirement of the statute, it could be sued with respect to any cause of action.

The case of *Barrow Steamship Co.* v. *Kane*, 170 U. S., 100, 42 L. E., 964, has no application.

The facts in that case were:

The plaintiff was a citizen of New Jersey, the defendant an English corporation, the cause of action arose outside the State of New York, and under the provisions of Section 1780 of the Code of Civil Procedure, as it then stood, the action could not be maintained in the courts of New York. The Court held that this statute did not deprive the United States Circuit Court of Appeals of its jurisdiction, under the Constitution, of controversies between citizens and foreign corporations, and it was held that service upon the *general agent* of a corporation was good under the third subdivision of Section 432 of the Code of Civil Procedure.

Respectfully submitted,

PIERRE M. BROWN,
Counsel.